No. 9531

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EARL CANNING,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT EARL CANNING

Upon Appeal From the United States District Court For the District of Arizona

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STATEMENT OF THE CASE

Appellant Earl Canning appeals from a judgment of the District Court of the United States, for the District of Arizona, finding him guilty and sentencing him to a term of imprisonment of one year in jail under the sixth count of an indictment under which he was charged with Raymond F. Marquis, George H. Cornes, Harry S. Marquis and Edgar G. Hamilton jointly, in the first five counts thereof, with the use of the United States mails in furtherance of a scheme to defraud (Sec. 338, Title 18, USCA, Sec. 215 Criminal Code) and in the sixth count jointly with the same persons with conspiracy to use the mails in furtherance of a scheme to defraud (Sec. 88, Title 18, USCA, Sec. 37 Criminal Code).

INDICTMENT

The indictment is set forth in full in the transcript of the record at pages 158-236.* In substance it charges that Raymond F. Marquis, George H. Cornes, Harry S. Marquis, Earl Canning and Edgar G. Hamilton in the first five counts with the use of the United States mails in furtherance of a scheme to defraud, and in the sixth count with conspiracy to use the mails in furtherance of a scheme to defraud.

FIRST COUNT

It is charged in the first count that the defendants devised a scheme and artifice to obtain moneys and properties from each of the individuals named as the persons to be defrauded in the first five counts of the indictment, and alleges that the scheme and artifice was to defraud and that the scheme was to be effected by,

(1) The incorporation of the State Securities Corporation for the alleged purpose of selling stocks and bonds to raise money to purchase or establish a life insurance company, the Union Reserve Life Insurance Company, the capital stock of the State Securities Corporation being represented by 250,000 shares of stock of no par value.

(2) That the defendants would secure for themselves and other incorporators 50,000 shares of the capital stock of State Securities Corporation for the purpose of reselling the same to persons to be defrauded and to retain proceeds of such sales for the sole benefit of defendants.

*Where figures alone appear they refer to pages in Transcript of the record.

(3) That defendants would sell to persons to be defrauded such shares of stock by making false and fraudulent pretenses, representations and promises concerning the value of said stock and payment of dividends and by representing that dividends had been voted.

(4) That the State Securities Corporation was to purchase and obtain control of the insurance company for the purpose of aiding defendants in the sale of stocks and bonds of the said State Securities Corporation to the persons to be defrauded.

(5) That said defendants after having sold bonds of the State Securities Corporation to the persons to be defrauded would by false and fraudulent pretenses and representations induce the holders of said bonds to exchange them for shares of the capital stock of State Securities Corporation.

It is further alleged that among the material false and fraudulent pretenses and representations, so made and to be made by defendants to persons to be defrauded, for the purpose of inducing said persons to invest moneys and property in the bonds and shares of stock of State Securities Corporation were the following:

(a) That the shares of stock of State Securities Corporation would pay back dividends and that a dividend of seven per cent, or more, would be paid within a year, whereas in truth and in fact dividends would not be paid upon the stock of said State Securities Corporation.

(b) That in December, 1937, a dividend had been voted by the Board of Directors of State Securities Cor-

poration and would be paid in January, 1938, whereas in truth and fact the Board of Directors never did vote a dividend and there was no reason to believe that a dividend would be paid.

(c) That the defendants, as officers of the State Securities Corporation and of the Union Reserve Life Insurance Company, were not drawing salaries from either of said companies, whereas defendants, and each of them, did draw large sums of money from each of said companies for services allegedly rendered said companies.

(d) That the State Securities Corporation was in good financial condition and on December 31, 1931, had assets over liabilities in the amount of $135,660.41, whereas the State Securities Corporation in truth and fact was not in good financial condition and did not on December 31, 1931, or at any other time, have assets in excess of liabilities in the amount of $135,660.41 or in any amount approximating that sum, or at all.

(e) That during the year 1936, the mortgage loans of the Union Reserve Life Insurance Company were increased twelve percent, whereas in truth and fact the loans were not increased in any amount *by the investment of additional funds of the insurance company, but that the increase appearing upon the books of Union Reserve Life Insurance Company was a mere write up of the value of mortgage loans already existing.**

(f) That on December 31, 1936, the Union Reserve Life Insurance Company had bonds and cash items on

*Emphasis, unless otherwise noted, is ours.

hand in the bank in the amount of $22,574.50, whereas it did not have on hand such assets in that amount, but that included in such items, as shown upon the books of Union Reserve Life Insurance Company were certain items and assets received by the Union Reserve Life Insurance Company in January and February, 1937, amounting to approximately $6,259.25.

(g) That on December 31, 1936, the Union Reserve Life Insurance Company had on hand cash in the amount of $7,653.37, whereas actually it had on hand at that time cash in the amount of approximately $1394.12 only.

(h) That on June 30, 1937, 19022 shares of the capital stock of State Securities Corporation were issued and outstanding, whereas on said date, *to all intents and purposes* there were 50,000 shares of its capital stock issued and outstanding in that the Articles of Incorporation of said State Securities Corporation provided for the allocation of 50,000 shares to the incorporators and by resolution of the Board of Directors the allocation and issuance of said 50,000 shares was ratified, approved and confirmed.

It is charged in the first count that in furtherance of the scheme and artifice, above set forth, the defendants mailed to Guy J. Baker, Casa Grande, Arizona, a letter which is set out in the first count.

SECOND COUNT

The second count adopts the allegations of the first count as to the scheme and artifice therein alleged and then alleges that in furtherance of such scheme the de-

fendants mailed to H. E. Simmons, Cave Creek, Arizona, the letter set forth in said count.

THIRD COUNT

The third count adopts the allegations as to the scheme and artifice set forth in the first count and then alleges in furtherance thereof the defendants mailed to Mrs. May E. Bonar, 211 West Elm Street, Compton, California, the letter therein set out.

FOURTH COUNT

The fourth count of the indictment adopts the allegations as to the scheme and artifice to defraud set forth in the first count and alleges in furtherance of such scheme the defendants mailed to Gerald Palmer, Cross Triangle Guest Ranch, Prescott, Arizona, the letter therein set out.

FIFTH COUNT

The fifth count adopts the allegations of the scheme and artifice to defraud set forth in the first count and alleges that in furtherance thereof the defendants mailed to Mr. and Mrs. W. H. Etz, Yarnell, Arizona, the letter therein set forth.

SIXTH COUNT

The sixth count alleges that beginning on or about December 1, 1929, and continuing until on or about January 1, 1938, the defendants did conspire, confederate, combine and agree together and with each other to *commit divers offenses charged against said defendants in the preceding five counts, made offenses by section*

215 *of the Criminal Code of the United States,* the allegations of which five counts are incorporated in the sixth count by reference and to use the Post Office establishment of the United States in the commission of said offenses, and charges that to effect the object of the conspiracy the defendants performed,

(a) The several acts of placing letters in the Post Office establishment of the United States at Phoenix, Arizona described in the preceding five counts of the indictment.

(b) The numerous acts of preparing said letters for mailing and delivery and the making of the false and fraudulent, pretenses in the first count of the indictment described and obtaining by means thereof the moneys and properties of the persons named in the first count of the indictment as well as certain other overt acts in the indictment specified:

1. That, in furtherance of said conspiracy, on or about November 26, 1937, defendants prepared and caused to be prepared the combined balance sheet of the corporation and insurance company as of June 30, 1937;

2. That, in furtherance of said conspiracy, on or about November 26, 1937, defendants mailed and caused to be mailed to stockholders of the corporation and others a letter dated November 26, 1937, and included in said letter a copy of the combined balance sheet of the corporation and the insurance company as of June 30, 1937;

3. That subsequent to December 31, 1936, and while said conspiracy was in existence, as hereinbefore alleged, and in furtherance thereof, the defendants prepared and caused to be prepared an annual statment of the insurance company covering the year ending December 31, 1936;

4. That subsequent to December 31, 1936, and on or about March 8, 1937, and in furtherance of said conspiracy, the defendants filed and caused to be filed with the Arizona Corporation Commission the annual statement of the insurance company;

5. That in furtherance of said conspiracy, on or about March 2, 1937, the defendants mailed and caused to be mailed to stockholders and bondholders of the corporation a financial statement of the Union Reserve Life Insurance Company as of December 31, 1936;

To this indictment the appellant Earl Canning filed a demurrer, which was by the Court overruled and exception noted (80).

BILL OF PARTICULARS

Appellant Earl Canning filed a request for a Bill of Particulars and the government filed what it considered to be a Bill of Particulars in compliance with his request. Thereafter appellant Earl Canning filed objections to the Bill of Particulars, as filed by the government, and a request for a supplemental Bill of Particulars, which objections and request were separately and severally denied by the Court and exceptions duly noted (82).

PLEA OF NOT GUILTY

The appellant Earl Canning entered a plea of not guilty and persists in the same. All of the other defendants pleaded not guilty.

TRIAL

The trial commenced on March 19, 1940, and continued from day to day, until April 12, 1940, when the cause was submitted to the jury and the jury on April 13 1940, returned into open Court their verdicts finding the defendant Raymond F. Marquis guilty on all six counts of the indictment; defendant George H. Cornes guilty on counts three, five and six of the indictment and not guilty on counts one, two and four; Harry S. Marquis guilty on count six and not guilty on counts one, two, three, four and five; defendant Edgar G. Hamilton guilty on counts five and six and not guilty on counts one, two, three and four, and appellant Earl Canning guilty on count six and not guilty on counts one, two, three, four and five.

At the beginning of the trial, upon stipulation of all of the attorneys, the Court made an order that any objection made on behalf of any defendant, or an exception taken on behalf of any defendant, should inure to the benefit of all. This was for the purpose of preventing the necessity of the attorney for each defendant repeating objections made by some other attorney and the resultant confusion in the trial.

EVIDENCE

It would lengthen this statement of the case unduly to here again detail all of the evidence and objections

which are set forth in full in the Transcript of the Record, and which will be referred to in the discussion of the assignments of error later in this brief, but it is thought that a condensed, concise statement of the ultimate facts shown by the evidence will at this point be helpful.

It was shown by the evidence that Raymond F. Marquis in December, 1929, in cooperation with Harry S. Marquis and George H. Cornes, co-defendants, and in cooperation with other persons not named in the indictment, but including W. C. Ellis, R. J. Leavitt, James H. Kerby, Herbert S. Hall and E. J. Flannigan, formed a corporation under the laws of the State of Arizona and secured from the Corporation Commission of the State of Arizona a certificate of incorporation and permits to sell stocks and bonds.

It was shown that the purpose of the corporation was to sell its stocks and bonds and to accumulate in this manner sufficient funds and the securities in which the same should be invested to furnish the capital and the securities to be deposited with the Arizona Corporation Commission of and by a life insurance company, which it was planned to organize, or purchase, when sufficient funds had been accumulated.

The State Securities Corporation then began the sale of stocks and bonds and in December, 1929, a set of books for the State Securities Corporation was set up and the method of accounting set up by the defendant Raymond F. Marquis.

It was shown that the defendants Raymond F. Marquis, Harry S. Marquis and George H. Cornes together

with other persons not indicted, continued to sell the stocks and bonds of the State Securities Corporation and that in the latter part of March, 1933, the State Securities Corporation by stock purchase acquired the majority of the stock of the Union Reserve Life Insurance Company, an Arizona corporation, which had been first organized under the name of the First National Life Insurance Company, which name was changed in October, 1932, prior to the acquisition of the majority of its stock by State Securities Corporation to Union Reserve Life Insurance Company; that up until this time none of the defendants had any connection with the insurance company.

The defendants Raymond F. Marquis, George H. Cornes and Henry S. Marquis almost from the inception of the State Securities Corporation had been officers of that corporation and members of the executive committee of that corporation. Upon the acquisition of the stock of the Union Reserve Life Insurance Company the same three defendants became officers and members of the executive committee of the Union Reserve Life Insurance Company. Each of the two companies had numerous other directors who were not named in the indictment and among whom were some of the substantial citizens of Arizona.

The names of the directors of the State Securities Corporation and of the Union Reserve Life Insurance Company are in evidence and appear in the minutes of the two companies. The Union Reserve Life Insurance Company, particularly after its management was taken over by defendants Raymond F. Marquis, Harry S. Marquis and George H. Cornes,

wrote a great deal of life insurance and continued meeting promptly claims against it until the late Fall of 1937. The Union Reserve Life Insurance Company had re-insured a proportion of all of its risks with the Lincoln National Life Insurance Company. In the Fall of 1937 the Lincoln National Life Insurance Company undertook to cancel its re-insurance contract with the Union Reserve Life Insurance Company on the ground that the premiums due thereunder had not been paid. During the time that the Lincoln National Life Insurance Company claimed that its contract of re-insurance was no longer in effect and the Union Reserve Life Insurance Company claimed that it was in full force and effect, the Union Reserve Life Insurance Company suffered heavy claims through the deaths of certain persons insured by it in large amounts. The re-insurance contract of the Lincoln National Life Insurance Company was reinstated in January, 1938, but again it was claimed by the Lincoln National Life Insurance Company that the contract had again been cancelled in February, 1938. This left the Union Reserve Life Insurance Company without sufficient quick assets to pay the large claims that had matured against it through the deaths referred to above and the directors of the Union Reserve Life Insurance Company turned its business over to the Corporation Commission of Arizona in March, 1938.

While all of the bonds of said State Securities Corporation, which were sold were sold prior to the acquisition of the Union Reserve Life Insurance Company in 1933, some sales and attempts to sell stock were continued until about January 1, 1938.

Shortly after the Union Reserve Life Insurance Company was turned over to the Arizona Corporation Commission, a receiver was appointed by the Superior Court of the State of Arizona, in and for the County of Maricopa, for the State Securities Corporation. The appellant Earl Canning was first appointed receiver and served about a month, at which time he was succeeded by Hugh T. Cuthbert, who continued as such receiver of State Securities Corporation at least until after the trial of this cause in the District Court.

The defendant Edgar G. Hamilton joined the Union Reserve Life Insurance Company as a salesman in August, 1935, and continued in that capacity until about the time the Corporation Commission took over its affairs.

It was claimed by defendant Edgar G. Hamilton that he had no part in the management or control of either of the two companies. It was claimed by the defendant George H. Cornes that while he was an officer and member of the executive committee of each of the two companies, most of his time was spent either in the field selling, in the beginning stocks and bonds of the State Securities Corporation, and in the latter part of the operation of the two companies in the selling of insurance. It was claimed by defendant Harry S. Marquis that while he was an officer and member of the executive committee of each of the two companies, his time was largely taken up in the field in work connected with the reinstatement of insurance policies in the Union Reserve Life Insurance Company after the acquisition of the Union Reserve Life Insurance Company and prior thereto

in sales of bonds of the State Securities Corporation. It was thus claimed by the three co-defendants named that Raymond F. Marquis was the directing head of both companies and Raymond F. Marquis testified that he was, but for the purposes of this appeal for appellant Earl Canning, this matter becomes immaterial.

There was evidence introduced of the mailing of the letters set forth in the five counts of the indictment and of representations made to purchasers of stocks and bonds by each of appellant's co-defendants Raymond F. Marquis, George H. Cornes, Harry S. Marquis and Edgar G. Hamilton, which the government charged were false and fraudulent.

The government also introduced evidence that each of the four named co-defendants have drawn large sums of money from the State Securities Corporation and the Union Reserve Life Insurance Company.

A great deal of evidence, documentary and otherwise, was presented by the government to which the appellant Earl Canning objected on the ground that there had been no proper foundation laid as to him, no proper identification and that as to him such evidence was pure hearsay, and he requested that the Court at the time of the reception of such evidence limit its effect to the defendant or defendants against whom it was directed and instruct the jury that they could not take it into consideration as to him. His objections and request were overruled and denied and exceptions duly noted (247-250-258-261-287-305-394-445-480-481).

AS TO APPELLANT EARL CANNING

The evidence as to the connection of the defendant Earl Canning with the State Securities Corporation and the Union Reserve Life Insurance Company summarized is as follows:

The appellant was first employed by the State Securities Corporation through his co-defendant Raymond F. Marquis in March, 1930; that thereafter he kept the books of the State Securities Corporation from cancelled checks, stubs and memoranda furnished him by the employees in the office of the State Securities Corporation and assisted in the preparation of financial statements from such books and records; that in keeping the books he was not regularly or continuously employed by State Securities Corporation, but posted the books from such memoranda, cancelled checks and check stubs either in his own independent office or in the office of the State Securities Corporation at odd times; that subsequent to the acquisition of the majority stockholdings in the Union Reserve Life Insurance Company in 1933 its books were kept by government witness King Wilson and Ora T. Hill and other employees in the office of Union Reserve Life Insurance Company, and that as to such books the appellant Earl Canning assisted in making certain reports and financial statements.

For this work it was agreed that he would receive $2.00 per hour up until the time he became a certified public accountant and that thereafter he would receive $3.00 per hour. It was shown that at these rates he earned during his entire service for the two companies from 1930 to 1938, inclusive, $6082.25 of which he was

paid $5623.55 leaving a balance still due him of $458.70, Defendant's Exhibit No. AM in evidence (733).

It was shown by government's witnesses Ora T. Hill (285-317 338-457) and King Wilson (261) and by defendant Raymond F. Marquis that appellant Earl Canning had nothing to do with the policy, management or control of either of said companies and there was no evidence from any source that appellant Earl Canning ever sold or assisted in the sale or attempted to sell or assisted in any attempt to sell any stocks or bonds or any life insurance policies or that he profited from any of the activities of the companies or either of them, or any of his co-defendants, except to the extent of his employment at his usual and ordinary rates of $2.00 per hour up until the time he became a certified public accountant and $3.00 per hour thereafter.

Since the jury acquitted the defendant Earl Canning on the first five counts of the indictment, in which counts are contained all of the allegations of the indictment which charge or attempt to charge any false or fraudulent statement in any of the financial statements involved, it is deemed unnecessary in this statement of the evidence to review in detail the evidence offered by the government through its witness E. P. Hair, an accountant of the Federal Bureau of Investigation, in criticism of financial statements made by the defendant Earl Canning, since such criticism was offered in support of the allegations contained in Count 1 of the indictment upon which the defendant Earl Canning was acquitted.

It was shown by the evidence that the annual statement of the Union Reserve Life Insurance Company as

of December 31, 1936, referred to in paragraphs 3 and 4 of the sixth count of the indictment, was prepared shortly before March 8, 1937, as is alleged in paragraph 4 of the sixth count of the indictment. It was testified by government's witness King Wilson and Ora T. Hill and by the appellant Earl Canning that of the annual statement he assisted in the preparation of pages 1, 2, 3, 4, 5 only; that the balance of the annual statement was prepared and signed by the officers and employees of the Union Reserve Life Insurance Company without any assistance from Mr. Canning. It was testified by government's witness E. P. Hair that such annual statement, in so far as it purported to reflect the books of the Union Reserve Life Insurance Company, was correct (637).

It was shown by the books themselves in evidence as Exhibits No. 8-10-11-12 that such annual statement does correctly reflect the books. It was testified to by government's witness King Wilson and defendant Raymond F. Marquis and defendant Earl Canning and other witnesses, that the actuarial calculations contained in such statement were made by government's witness King Wilson and defendant Raymond F. Marquis and not by defendant Earl Canning and his certificate specifically excepts such actuarial calculations.

In the first count of the indictment the annual statement as of December 31, 1936, is criticized in three particulars,

(a) That the mortgage loans of the insurance company were increased by a mere write up of the value of the mortgage loans already existing on the books. In this regard the minutes of the State Securities Cor-

poration, Exhibit No. 26C- 26G 26V 26J in evidence, and the minutes of Union Reserve Life Insurance Company, Exhibit 27B in evidence, show that increased loans were authorized and the mortgages themselves for the alleged fictitious increases are in evidence as Exhibits AI, AI-2 and AG1-AH1.

(b) That the said statement as of December 31, 1936, was erroneous in that it included certain items and assets received by the company in January and February, 1937, amounting to approximately $6259.25. In this connection the government's witness E. P. Hair testified that the statment correctly reflected the books. It was testified that as is alleged in paragraph 4 of the sixth count of the indictment, the annual statement as of December 31, 1936, was prepared on or shortly before March 8th in 1937 and that at such time cash items which otherwise woud have been included in the statement as of December 31, 1936, had been collected in cash and that the cash for such subsequently collected cash items had been entered in the books under date of December 31, 1936. It was further testified that such practice is usual and customary with insurance companies for the reason that they are compelled to calculate their reserves in advance of the receipt of premiums and that these cash items, subsequently collected, were premiums due and deferred and that the result of entering them as of December 31, 1936, although received subsequently thereto, and in January and February, 1937, did not at all change the statement of assets and liabilities; that the cash was merely substituted for a like amount of due and deferred premiums because the cash had been received at the time the statment was made.

On these criticisms of the statment as of December 31, 1936, the appellant Earl Canning was acquitted.

In the sixth count of the indictment there is no allegation of anything wrong, fraudulent or misleading concerning the annual statement as of December 31, 1936.

In the evidence it was testified that the Home Owners Loan Corporation bonds shown by the ledger (Exhibit No. 12) to have been in the possession of the Union Reserve Life Insurance Company on December 31, 1937, were in fact at that time pledged to a bank as collateral (446-456), but government's witness E. P. Hair testified that the annual statement correctly reflected the ledger.

The statement contained in the annual statement as of December 31, 1936, filed with the Arizona Corporation Commission stating that all bonds and securities shown by the statement had been checked and found in the possession of the Union Reserve Life Insurance Company, appearing on page 8 of the annual statement, was not made by the appellant Earl Canning, but on the contrary was made, as appears form the evidence (261) by government's witness King Wilson. The combined balance sheet of the State Securities Corporation and the Union Reserve Life Insurance Company as of June 30, 1937, prepared on or about November 26, 1937, it was testified to by government's witness E. P. Hair correctly reflects the ledger items as carried in the books, which it purports to reflect. It was testified by defendant Raymond F. Marquis (698) and the government's witness King Wilson (268) and appellant Earl Canning (734)

that the actuarial figures and calculations contained on that combined balance sheet were prepared and furnished by defendant Raymond F. Marquis and the government's witness King Wilson and in his certificate on such combined balance sheet, as of June 30, 1937, appellant Earl Canning excepts such actuarial calculations.

There was no evidence that the appellant Earl Canning ever mailed or caused to be mailed to any person whomsoever any letter, or any financial statement and no evidence that he ever mailed or caused to be mailed the combined balance sheet of the corporation and the insurance company as of June 30, 1937, referred to in paragraph 2 of the sixth count of the indictment, and no evidence that he mailed any financial statement referred to in paragraph 5 of the sixth count of the indictment.

At the conclusion of the government's case the appellant Earl Canning moved to strike certain exhibits, which will be more fully discussed under the assignments of error, which motions were by the Court denied and exceptions duly entered.

At the close of the government's case appellant Earl Canning moved for a directed verdict, separately and severally as to each count of the indictment, which motions were by the Court separately and severally denied and the exceptions duly noted.

At the conclusion of the whole case appellant Earl Canning moved to strike certain evidence to which objections had been made and exceptions noted, which exceptions under the stipulation made at the beginning of

the trial were for the benefit of appellant Earl Canning, which motions to strike were separately and severally denied by the Court and exceptions duly noted. At the close of the whole case the defendant Earl Canning again moved the Court to direct the jury to return verdicts of not guilty as to him, which motions were by the Court denied and exceptions duly noted.

During the trial the defendant Earl Canning made timely request that the Court give to the jury certain instructions as set forth in the Transcript of the Record, pages 83-103. The Court at the conclusion of the evidence and argument marked appellant Earl Canning's requested instructions as given or refused and filed them with the Clerk, and the Court instructed the jury to which refusal of the Court to give his requested instructions and to the instructions, as given by the Court, the appellant Earl Canning, in open Court, duly excepted and such exceptions were duly noted.

The jury returned a verdict finding the appellant Earl Canning guilty on count six (this is the conspiracy count of the indictment) and finding him not guilty on counts one, two, three, four and five (mail fraud counts of the indictment).

On the 13th day of May, 1940, the Court pronounced judgment that the appellant Earl Canning was guilty as charged in the sixth count of the indictment and sentenced him to a year in jail.

On the same date the appellant Earl Canning filed his notice of appeal and also filed his bail bond on appeal.

The Bill of Exceptions has been timely allowed and assignments of error have been timely filed, and the case is now here on appeal.

SPECIFICATION OF ERRORS

Appellant Earl Canning relies upon all and each of the assignments of error, which are set forth in the transcript of record beginning on page 158.

The appropriate assignments of error will be set out in full in this brief in the argument under the several questions herein presented.

QUESTIONS PRESENTED

The questions presented on this appeal are:

I.

Is the indictment fatally defective?

II.

Did the Court err in overruling the objections of the appellant to the bill of particulars as furnished by the government, and in denying appellant's request for a further bill of particulars?

III.

Did the Court err in admitting, as against this appellant, evidence of acts and declarations of alleged co-conspirators in the absence of any sufficient evidence that the appellant had entered into any conspiracy, and in the absence of any evidence that the appellant had any knowledge of such acts and declarations?

IV.

Did the Court err in admitting in evidence books, records and cancelled checks and check stubs for the further reason that no materiality was shown and there was no proof that such books and records and the entries therein were kept in the regular course of business, and no compliance with the requirements of Section 695, Title 28, U.S.C.A. and for the reason that as construed by the District Court said section is unconstitutional because it violates the sixth amendment to the Constitution of the United States?

V.

Did the Court err in refusing to keep the government's witness King Wilson in attendance upon the Court for cross-examination by the appellant when the books and records which he had identified should be by the government offered in evidence, and in excusing the said witness from further attendance upon the Court over the objection and exception of the appellant?

VI.

Did the Court err in receiving over appellant's objections testimony of the government witness E. P. Hair on rebuttal concerning transactions between the Union Reserve Life Insurance Company and Marquis, Cornes & Marquis and J. Elmer Johnson?

VII.

Did the Court err in denying appellant's motions for directed verdict, made at the close of the Government's case and at the close of the whole case?

VIII.

Did the Court err in instructing the jury and in refusing appellant's requested instructions?

IX.

Did the Court err in refusing to strike from the testimony the exhibits admitted in evidence on behalf of the Government?

BRIEF OF ARGUMENT

I.

The indictment under review, and particularly the sixth count thereof, is fatally defective because it is vague, uncertain and indefinite and incomplete and does not state facts sufficient to constitute the offense described in Section 37 of the Criminal Code (U.S.C.A. Title 18, Section 88).

(a) It is essential to the validity of an indictment for conspiracy that it allege the object of the conspiracy and the time at which it is charged it was formed, definitely and completely. (Assignments of Error No. I. 158).

The Assignment of Error discussed under this part of the argument is directed entirely at the indictment and sets out particularly that said indictment does not state facts sufficient to constitute any offense against the United States or the laws thereof; that it does not state any fact sufficient to constitute the offense described in Section 38 of the Criminal Code, (18 U.S.C.A. Sec. 88); that it does not state facts sufficient to consti-

tute any scheme or artifice to defraud or to obtain money and property by means of false representations; that it does not constitute facts sufficient to constitute conspiracy; that it is duplicitous; that it does not apprise the defendant of the evidence or evidences with which he is sought to be charged; that each count thereof is vague, uncertain and indefinite to such an extent that a trial under this indictment would be no protection in the event of another prosecution for the same offense or offenses sought to be charged; that it does not apprise the defendant of what participation he had in the use of the mails; that it does not inform the defendant as to what acts of his were fraudulent, false, illegal or wrongful; that it does not apprise the defendant whether he is charged with devising or intending to devise more than one scheme to defraud. (See Appendix for Assignment of Error in full, pp. 75-79)

IS THE INDICTMENT FATALLY DEFECTIVE?

It is the contention of the defendant Earl Canning that the Court erred in overruling this defendant's demurrer to the indictment. It will be noted, in examining the indictment, that the charges set forth in the First Count are incorporated by reference in each of the other five counts. In order, then, to analyze the indictment it is necessary to examine particularly the charges in the First Count. Two things are necessary to be alleged in order to charge a criminal offense: First, the formation of a scheme or device to defraud; Second, the use of the mails in carrying out that scheme or device.

It is a well settled rule of law that nothing is taken by intendment in an indictment. The indictment must

fairly state the essential of the offense sought to be charged in such way as to apprise the defendant of what he must be prepared to meet. Clearly the indictment in the instant case does not do this. The charging part of the indictment, in so far as the formation of the scheme or device to defraud is concerned, reads as follows:

> "That said defendants, on or about December 9, 1929, would, together with other persons not herein named as defendants, organize and incorporate, and cause to be organized and incorporated, under the laws of the State of Arizona, a corporation known as State Securities Corporation, hereinafter referred to as 'the Corporation', for the alleged purpose of selling stocks and bonds to raise money to purchase or establish a life insurance company, namely, the Union Reserve Life Insurance Company, hereinafter referred to as 'the Insurance Company', the capital stock of said corporation being represented by 250,000 shares of stock of no par value;
>
> "That as a part of said scheme and artifice, said defendants would secure for themselves and the other incorporators 50,000 shares of the capital stock of said corporation, for the purpose of reselling the same, or a large part thereof, to the persons to be defrauded, and to retain the proceeds of such sales for the sole benefit of said defendants;
>
> "It was further a part of said scheme and artifice that said defendants would sell to any and all of said persons to be defrauded, whom they could induce to purchase said shares and send and pay their moneys and properties to said defendants, by mak-

ing false and fraudulent pretenses, representations and promises concerning the value of said stock and concerning the payment of dividends to the shareholders thereof, and by making false and fraudulent pretenses, representations and promises that dividends upon said stock had been voted by the Board of Directors of said corporation, and by making other false and fraudulent pretenses, representations and promises in this indictment hereinafter alleged and set forth;

"It was further part of said scheme and artifice to have the State Securities Corporation purchase and obtain control of the Insurance Company, for the purpose of aiding said defendants in the sale of stocks and bonds of said Corporation to the persons to be defrauded by means of false and fraudulent pretenses, representations and promises;

"It was further a part of said scheme and artifice that after having sold bonds of the Corporation to the persons to be defrauded, they would, by false and fraudulent pretenses, representations and promises, induce the holders of said bonds to exchange said bonds for shares of the capital stock of said Corporation."

It will be noted, in the allegations of the indictment above set forth, that the charge is that defendants *would* do the things therein set out. There is nothing in the allegation or charge in the indictment anywhere that the defendants actually proceeded to do the things that it is charged they *would* do. It is charged that the de-

fendants agreed they *would* incorporate a corporation known as State Securities Corporation for the alleged purpose of selling stocks and bonds to raise money to purchase or establish a life insurance company known as Union Reserve Life Insurance Company. No charge is made that the said State Securities Corporation ever was incorporated, and no charge is made that the Union Reserve Life Insurance Company ever was organized or acquired by the defendants. It is charged that the defendants *would* secure for themselves and other incorporators fifty thousand shares of the capital stock of said State Securities Corporation for the purpose of reselling same and retaining the proceeds, but there is no charge in the indictment that these defendants or either of them ever did secure for themselves or any person or persons the fifty thousand shares of the capital stock mentioned therein. It is charged in the indictment that the defendants *would* sell said shares by making false and fraudulent pretenses, representations and promises, but nowhere in the indictment is it charged that the defendants or any of them ever sold any of said stock to any person or persons. It is further charged that defendants *would* have the State Securities Corporation purchase and obtain control of the insurance company for the purpose of aiding said defendants in the sale of stocks and bonds of the corporation to the persons to be defrauded but there is no charge in said indictment that said State Securities Corporation ever did purchase and obtain control of the insurance company. It is further charged that the defendants *would,* after having sold the bonds of the corporation to the persons to be defrauded, by false and fraudulent pretenses, representations and promises induce the holders of said bonds to exchange

said bonds for shares of the capital stock of said corporation, but nowhere in said indictment is it ever charged that the defendants, or any of them, ever caused any bonds to be issued by said corporation, or ever induced or tried to induce the holders of any of said bonds to exchange said bonds for shares of stock in the corporation.

It is hard to understand, in reading the entire indictment, how the specific things charged as having been done by the defendants can be based on the premise that the defendants did do the things which it is charged that they agreed they *would* do.

Nowhere in the indictment is there any charge as to the manner in which any person was to be defrauded. So far as the indictment is concerned there is no allegation or charge in the indictment which could in any manner support a conviction if the indictment was for obtaining money or property by false and fraudulent representations.

While it is understood that the gist of the offense is the using of the mails in furtherance of the scheme to defraud, yet there must be a sufficient allegation or charge in the indictment to permit proof that such scheme was formed and that it was calculated to defraud, and intended to be used for the purpose of defrauding, before the use of the mails in furtherance of such scheme becomes a criminal offense.

It is also clear, from a reading of the charges in the indictment, that more than one scheme or device is attempted to be charged. It is attempted to be charged in

the indictment that one of the schemes was to organize the State Securities Corporation and procure the issuance of fifty thousand shares of its capital stock to the defendants for the purpose of selling same, and the other scheme charged is to procure, either by purchase or organization, the Union Reserve Life Insurance Company for the purpose of using it to defraud. Clearly, an indictment based on two separate schemes is demurrable.

U. S. v. Siebrecht, 59 Fed. (2d) 976 (CCA 2 1932);

Shelton v. U. S., 67 Fed (2d) 388 (CCA 5, 1933);

Terry v. U. S., 7 Fed. (2d) 28 (CCA 9, 1925);

U. S. v. Ball, 294 Fed. 750 (DCMD Pa. 1924);

McLendon v. U. S., 2 Fed. (2d) 660;

Benham v. U. S., 7 Fed (2d) 271 (CCA 6 1925);

U. S. v. Brown, 79 Fed. (2d) 321 (CCA 2 1935);

U. S. v. McNamara, 91 Fed. (2d) 986 (CCA 2 1937);

Collins v. U. S., 253 Fed. 609, (CCA 9);

Beck v. U. S. 33 Fed. (2d) 107, 109, (CCA 8);

U. S. v. Halsey, Stuart & Co., 4 F. Supp. 662;

U. S. v. Smith, 29 Fed. (2d) 926, 928;

Pelz v. U. S., 54 Fed. (2d) 1001, 1005, (CCA 2);

Colburn v. U. S., 259 Fed. 371, (CCA 8), cert. denied, 251 U. S. 556;

18 *U. S. C. A.* sec. 338;

Norton v. U. S. 92 Fed. (2d) 753, (CCA 9).

II.

The Court in overruling the objections of the appellant to the Bill of Particulars, as furnished by the government, and in denying appellant's request for a further Bill of Particulars, abused sound judicial discretion to the prejudice of appellant. (Assignments of error II, 162).

Assignment of Error No. II, discussed under this part of the argument, deals with the failure of the Government to furnish this defendant a complete Bill of Particulars, and the overruling of the motion by defendant for a more particular Bill of Particulars, for the reason that the purported Bill of Particulars furnished was evasive, indefinite and incomplete, constitute conclusions of law, and did not fully and fairly disclose the information to which this defendant appellant was entitled. (See Appendix for Assignment of Error in full, pp. 79-81).

DID THE COURT ERR IN OVERRULING THE OBJECTIONS OF THE APPELLANT TO THE BILL OF PARTICULARS AS FURNISHED BY THE GOVERNMENT AND IN DENYING APPELLANT'S REQUEST FOR A FURTHER BILL OF PARTICULARS?

The defendant Canning demanded from the United States Government a Bill of Particulars concerning the allegations of the indictment, and in said demand specified forty-nine different items on which the defendant claimed he was entitled to have more information than was set out in the indictment, in order to properly prepare his defense. In response to that demand the United States District Attorney furnished a so-called purported

Bill of Particulars, which this defendant contends did not contain the information in possession of the United States and which the defendant was entitled to have before requiring him to plead to said indictment and before being required to make his defense. This defendant filed his objections to the so-called Bill of Particulars furnished and asked the Court to make an order requiring the government to supplement the purported Bill of Particulars and to give to the defendant the information which the government had and which was necessary for the defendant's defense and to which the defendant was entitled. This demand was by the Court denied, and this defendant duly excepted to the ruling of the Court in overruling this defendant's demand for a supplemental Bill of Particulars.

In examining the Bill of Particulars furnished by the government, it will be noted that paragraphs I, II, III, IV, V, IX, X, XIV, XVII, XVIII, XIX, XX, XXI. XXII, XXIII, XXIV, XXV, XXVI, XXVII, and XXVIII of the purported Bill of Particulars furnished to the defendant are severally and separately evasive, indefinite, uncertain and incomplete and constitute conclusions of law, and do not fully or fairly disclose the information sought by this defendant; that the answers to the demands set up in this demand for a supplemental Bill of Particulars are not answers which disclose to this defendant the facts relied upon by the government in charging or proving the allegations or charges in the indictment.

Paragraphs VI, VII, VIII, IX, XI, XIII, XIV, XV, XXXIX, XLIV, XLVI, XLVII, XLVIIII of the purported Bill of Particulars severally and separ-

ately are evasive, indefinite, uncertain and incomplete, and constitute conclusion of law, and do not fairly disclose the information requested by this defendant, and do not give to this defendant the information in possession of the government, upon which the government relied to prove the charges in the indictment.

That in answer to the demand made in paragraph 49 of defendant's demand for Bill of Particular's, which answer is set forth in paragraph XLIX of the government's purported Bill of Particulars, having particular reference to the financial statement in paragraph numbered 5 of the sixth count of the indictment and the financial statement referred to in paragraph numbered 3 of the sixth count of the indictment, it appears from paragraph XLIX of the purported Bill of Particulars filed by the government that said financial statements are not identical and the difference between the two is not fairly and fully disclosed by the government's Bill of Particulars as filed.

In answer to paragraph 8 of this defendant's demand for Bill of Particulars, which is as follows, "To whom were any such false, fraudulent or misleading representations, pretenses or promises made?", the government in its purported Bill of Particulars answered as follows: "In reply to paragraph 8, such false, fraudulent and misleading representations, pretenses and promises were made to the public generally, to the stockholders and bondholders of the corporation, and the policy holders of the insurance company, to the Corporation Commission of the State of Arizona, and to Dunne's Insurance Reports, Louisville, Kentucky." In this answer, for

the first time, it is claimed that the reports to the Corporation Commission of the State of Arizona and to Dunne's Insurance Reports were false, fraudulent and misleading, and in order to properly prepare his defense to the indictment it was necessary that this defendant be furnished by the government a supplemental Bill of Particulars containing copies of the written reports to the Corporation Commission of the State of Arizona and to Dunne's Insurance Reports, Louisville, Kentucky which are claimed to have been false, fraudulent and misleading.

It is so well settled that the defendant is entitled to a complete Bill of Particulars when the charges in the indictment are not sufficient to apprise him of what he must meet at the trial of the case, and that the Court should order and require a Bill of Particulars to be furnished, an extensive argument of this assignment of error is not deemed necessary.

Collins v. U. S. (CCA 9) 253 Fed. 609;

Case v. U. S. (CCA 9) 6 Fed. (2d) 530;

Perez v. U. S. (CCA 9) 10 Fed. (2d) 352, 353;

Beck v. U. S. (CCA 8) 33 Fed. (2d) 107;

Durland v. U. S. 161 U. S. 306, 314-5;

U. S. v. Halsey, Stuart & Co. 4 F. Supp. 662;

U. S. v. Grove (D. C.) 12 F. Supp. 372;

U. S. v. Nat. Title Guar. Co. (D. C.) 12 F. Supp. 473;

Shreeve v. U. S. 77 Fed. (2d) 2.

III.

Evidence of acts and declarations of alleged co-conspirators were not admissible against appellant because,

(a) There was no evidence that the appellant entered into any conspiracy.

(b) There was no evidence that appellant had any knowledge of such acts and declarations, either before or subsequent thereto.

(c) As to him, such evidence was pure hearsay. (Assignments of Error X, XI, XII, XXXIV, XXXV, XXXVI, XXXVII, XXXVIII, XXXIX, XL, XLI, XLII, XLIII, XLIV, XLV, XLVI, XLVII, XLVIII, XLIX, L, LI, LII, LIV, LV, LVI, LVII, LVIII, LXI, LXII, LXIII, LXV, LXXI, LXXIII) (170, 171, 172, 173, 174, 175, 177, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 200, 201, 202, 203, 204, 207, 210, 213).

The Assignments of Error dealt with under this subdivision of the argument have to do with the admission of acts and declarations of the alleged co-conspirators against this defendant, over his objection; it deals with the minutes of the meetings of the board of directors of Union Reserve Life Insurance Company, with the minutes of the meetings of the executive committee and meetings of stockholders of Union Reserve Life Insurance Company, of carbon copies of certain letters addressed to George H. Cornes, of minutes of meetings of stockholders of State Securities Corporation, minutes of meetings of the executive committee of State Securities Corporation, an envelope and contents addressed

to Mrs. W. H. Etz, conversations between Helen G. Etz, E. G. Hamilton, and R. F. Marquis, business card of E. G. Hamilton, a certain envelope and contents thereof addressed to W. H. and Mrs. Helen G. Etz, a certain receipt signed by E. G. Hamilton, portions of the records of the First National Bank of Arizona, carbon copies of letters addressed to Insurance Index, letter and enclosures addressed to H. F. Link, letter addressed to Gerald Palmer, purported conversations between Bill Etz, his wife, his father and his mother, a stamped envelope and contents addressed to May E. Bonar, a letter and envelope addressed to May E. Bonar, a certificate for shares of the capital stock of State Securities Corporation issued to L. Jo Hall, a letter with envelope addressed to H. E. Simmons, carbon copy of letter addressed to May E. Bonar. (See Appendix for Assignments of Error in full, pp. 81-101).

DID THE COURT ERR IN ADMITTING AS AGAINST THIS APPELLANT EVIDENCE OF ACTS AND DECLARATIONS OF ALLEGED CO-CONSPIRATORS IN THE ABSENCE OF ANY SUFFICIENT EVIDENCE THAT APPELLANT DID ENTER INTO ANY CONSPIRACY AND IN THE ABSENCE OF ANY EVIDENCE THAT APPELLANT HAD ANY KNOWLEDGE OF SUCH ACTS AND DECLARATIONS?

In presenting this question we state the well established principal of law, as follows:

> "In order that the acts or declarations of an alleged conspirator may be admissible against an alleged co-conspirator the existence of the conspiracy

must be shown; it also must be shown that the defendant against whom the evidence is offered was a party to such conspiracy. The fact that the indictment charges a conspiracy does not dispense with the necessity of proof of the existence of such conspiracy in order to render the acts or declarations of one conspirator admissible against another."

In discussing this phase of the case, it naturally falls into two classifications:

The first classification, covered by Assignments of Error X, XI, XII, XXXIX, XL, XLI, XLII, XLIII, LXIII and LXV (170, 171, 172, 173, 174, 175, 176, 177, 191, 192, 193, 194, 204, 207) has to do with the introduction in evidence of minutes of the meetings of the board of directors, stockholders and executive committee of Union Reserve Life Insurance Company, and of the minutes of the meetings of the board of directors, stockholders and executive committee of State Securities Corporation;

The second classification has to do with the incorporation in evidence of letters purported to have been written by some of the defendants, not the defendant Canning, and with conversations and statements alleged to have been made by some of the defendants, not the defendant appellant, as set out in Assignments of Error XXXIV, XXXV, XXXVI, XXXVII, XXXVIII, XLIV, XLV, XLVI, XLVII, XLVIII, XLIX, L, LI, LII, LIV, LV, LVI, LVII, LVIII, LXI, LXII, LXXI, LXXII (189, 190, 191, 194, 195, 196, 197, 198, 200, 201, 203, 204, 210, 211, 212, 213.)

Under the rule of law above set forth, it is the contention of defendant Canning that there is no evidence in the record establishing any conspiracy so far as appellant is concerned, but, on the contrary, the evidence and the weight of the evidence shows clearly that there was no conspiracy so far as appellant is concerned.

It is shown by the evidence (259, 372, 373) that prior and at the time of the incorporation of State Securities Corporation this defendant had nothing whatever to do with the affairs of the corporation, was not an incorporator, and was not in any wise connected with the company or the individuals who were stockholders, some of whom are defendants in this case. The record shows that State Securities Corporation filed its articles of incorporation in the office of the Arizona Corporation Commission on December 6, 1929, and certificate of incorporation was issued by the Corporation Commission on the 9th day of December, 1929 (245, 246). The indictment charges that the scheme and artifice to defraud was formed on or about December 9, 1929 (3).

The testimony of Ora T. Hill, who was the bookkeeper for Union Reserve Life Insurance Company from 1929 to March, 1938, sets forth particularly what Earl Canning had to do with the two corporations (327, 328, 330, 331):

> The Witness: Earl Canning was never regularly employed as a bookkeeper of the Union Reserve Life Insurance Company. He was an accountant who came in occasionally to help make financial statements. He made them from the entries in the book by me and King Wilson. I assisted Mr. Canning in

making the annual statements for Union Reserve Life Insurance Company, Government's Exhibit No. 7 in evidence. For the year 1936, Mr. Canning made the portion of the statement shown as income and disbursements, page 2 and 3 and 4. He made up the liabilities with the exception of the reserves. King Wilson calculated the reserves. Mr. Canning prepared pages 2, 3 and 4 and 5. I helped him and the figures were taken from the books of the Union Reserve Life Insurance Company which were kept by me and King Wilson. The same thing is true for the year 1933, 1934 and 1935. I assisted in the preparation of the 1936 report. The figures on that statement were taken from books kept by me and King Wilson. I assisted Mr. Canning in the preparation of the statement for 1934. Those figures were taken from the books of the Union Reserve Life Insurance Company, kept by me and King Wilson. I assisted Mr. Canning in the preparation of the statement for 1933. It was taken from the books of the Union Reserve Life Insurance Company kept by me and King Wilson. Each statement correctly reflects the books of the company. Mr. Canning posted the figures in one of the ledgers of the Union Reserve Life Insurance Company from the cash book in 1937. The items he posted were taken from the cash journal kept by me and King Wilson. So far as I know the items he posted in that ledger were carefully taken from that cash journal. Earl Canning was never a stockholder, officer or director in either the Union Reserve Life Insurance Company or State Securities Corporation. He had no part in the management or policies of the Union

Reserve Life Insurance Company or in the management of the State Securities Corporation. (327, 328)

The Witness: I do not have any knowledge of any activity of Earl Canning in connection with either of these companies or any of these defendants except that he occasionally came over and made the financial statements from the books kept by me and King Wilson. I did all of this work under the direction of R. F. Marquis. (330, 331)

From all of the testimony in this case it is apparent that the only connection the appellant ever had with either of these companies was as an employee, and that he was paid by the hour for his work (730, 731, 732, 733, 734):

The Witness: My name is Earl Canning. I am one of the defendants. I am fifty-three years old and live at 768 East Willetta, Phoenix. I have lived in Phoenix about forty-five years. I started to school here in the first grade. I went through the grammar and high school. The last year of high school I worked a half day and went to school a half day. Since I finished high school I worked for the Arizona Water Company which operated the canals before the United States Government took them over. Then I got a job at the capitol as assistant public examiner under W. C. Forster. Then I went to work for E. E. Pascall in a real estate office. I tried railroad work for three months and a half. Then came back to Phoenix, went to work for McArthur Brothers, then went to Globe and worked for W. I. Putman, came back to Phoenix, went to work for Green

and Griffin, the Home Builders. I became a bookkeeper, then an assistant secretary, then went to work as a public accountant in 1923. Worked as a public accountant until 1933, then became a certified public accountant and have been engaged in business for myself since 1923. I was never a stockholder, officer or director in either the State Securities Corporation or Union Reserve Life Insurance Company, I had nothing to do with the policy, management or control of either company. I never sold or attempted to sell any stock, bonds or insurance in either company. I did some accounting work for both companies. I started in 1930 and worked for them some until they were in the hands of the receiver and quit. I kept a record of the time I put in and the work I did for these companies.

Thereupon certain books were marked defendant's Exhibit AL for identification.

The Witness: These books are the diaries in which I kept the various hours that I worked. They are for the years 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937 and 1938. My arrangement for pay was $2.00 per hour until 1935. From 1935 I think I received $3.00 an hour.

Thereupon a document was marked Defendant's Exhibit AM for identification.

The Witness: The defendant's Exhibit AM for identification is a schedule showing the number of hours I worked each year and the pay received. It is a compilation of the time shown in these books, Exhibit AL for identification. I made it from the books and it clearly reflects the time shown in the books. It shows the total hours I worked during these years and the total amount I was to be paid and the total amount I was paid.

Thereupon Defendant's Exhibit AM for identification was offered in evidence and Defendant's Exhibit AM for identification was received in evidence as Defendant's Exhibit AM in evidence, which abstracted to the issue is:

DEFENDANT'S EXHIBIT NO. AM

ACCOUNTANT'S FEE RECEIVED BY EARL CANNING

State Securities Corporation and Union Reserve Life Ins. Co.

Year 1930 hours	234¾		
" 1931 hours	262½		
" 1932 hours	244¾		
" 1933 hours	317½		
" 1934 hours	596		
Total hours @ $2.00	1655½	$3,311.00	
Amount paid			$2,743.55
Year 1935 hours	461		
" 1936 hours	157¼		
" 1937 hours	206		
" 1938 hours	99½		
Total hours @ $3.00	923¾	$2,771.25	
Amount paid			2,880.00
Total earnings		6,082.25	
Amount paid			5,623.55
Balance Unpaid		458.70	

Earl Canning Audit Company—Phoenix-Prescott
Certified Public Accountant

The Witness: The total number of hours I put in at $2.00 per hour is 1655½ for the years 1930,

1931, 1932, 1933 and 1934. This amounted to $3311.00. They paid me during that time $2743.55. I put in 923¾ hours at $3.00 per hour, which amounted to $2771.25, making a total amount of $6082.25. I have been paid $5623.55, and they still owe me $458.70. I assisted in preparing page 2, page 3 and page 5 of Government's Exhibit 7 in evidence. I did not assist in preparing any other part of report (730, 731, 732, 733, 734).

In addition to the above testimony as to appellant's connection with the two corporations, the testimony of appellant on cross examination (743 to 773 inclusive) sets out in detail everything which appellant had to do with the two corporations.

As to the correctness of the work of appellant, the Court's attention is respectfully called to the testimony of the Government's witness, E. P. Hair (637, 638) where the witness says:

"I never did understand the basis for that, Government's Exhibit No. 33 in evidence, the annual report of the Union Reserve Life Insurance Company as of December 31, 1936. The cash and other items in that statement correctly reflects what appears in the books of the company in the ledger and cash journals. The item of $7150 Home Owners Loan Bonds is in the ledger of the Union Reserve Life Insurance Company. The increase in mortgages in the amount of $11,000 are reflected in the ledger of the Union Reserve Life Insurance Company. The statement in all its aspects clearly reflects the cash

books and the ledger of the Union Reserve Life Insurance Company."

Clearly under the testimony in this case, both from the Government's witnesses and the witnesses for the defense, there was nothing to show that the appellant was a party to any conspiracy, if any conspiracy did in fact exist. Neither is there any evidence in the record anywhere that this appellant had any knowledge of any of the things set forth in the Assignments of Error, either before or subsequent thereto.

16 *C. J.* 647, sec. 1287;

Minner v. U. S. (CCA 10 1932) 57 Fed. (2d) 506;

Scheib v. U. S. (CCA 7 1926) 14 Fed. (2d) 75;

Ridenour v. U. S. (CCA 7 1926) 14 Fed. (2d) 888;

Mayold v. U. S. (CCA 9 1934) 71 Fed. (2d) 65.

It being evident, therefore, from the evidence, that there was no proof that appellant entered into any conspiracy as set out and charged in the indictment, if any conspiracy in fact existed, or had any knowledge of such acts and declarations, the Court clearly erred in admitting in evidence against the appellant Government's Exhibit No. 27A (288, 289, 290), Government's Exhibit No. 27B (291, 292), Government's Exhibit No. 27C (293, 294, 295), Government's Exhibit No. 40 (342, 343, 344, 345), Government's Exhibit No. 42 (356, 357, 358), Government's Exhibit No. 43 (359, 360, 361, 362, 363, 364), Government's Exhibit No. 44 (365, 366, 367), Government's Exhibit No. 46 (378, 379, 380), Government's Exhibit No. 47 (381, 382, 383, 384, 385),

Government's Exhibit No. 27D (387, 388, 389), Government's Exhibit No. 27E (391, 392, 393), Government's Exhibit No. 26A (394, 395, 396), Government's Exhibit No. 26B (398, 399), Government's Exhibit No. 26C (401, 402), Government's Exhibit No. 45 (413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426), Government's Exhibit No. 50 (435), Government's Exhibit No. 35 (437, 438, 439), Government's Exhibit No. 51, (440), Government's Exhibit No. 52 (448, 449, 450, 451, 452, 453, 454), Government's Exhibit No. 53 (455, 456), Government's Exhibit No. 48A (458), Government's Exhibit No. 54 (460, 461), Government's Exhibit No. 34 (466, 467), Government's Exhibit No. 31 (473, 474, 475), Government's Exhibit No. 33, (481), Government's Exhibit No. 41 (482, 483, 484), Government's Exhibit No. 36 (489, 490, 491, 492, 493, 494), Government's Exhibit No. 56 (501, 502, 503, 504, 505, 506, 507, 508, 509), Government's Exhibit No. 57 (513, 514, 515), Government's Exhibit No. 58 (515), Government's Exhibit No. 32 (525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540), Government's Exhibit No. 62 (543, 544, 545), a part of Government's Exhibit No. 26 (545, 546, 547), Government's Exhibit No. 26D (547), Government's Exhibit No. 26E (548, 549), Government's Exhibit No. 26F (549, 550), Government's Exhibit No. 26H (553, 554, 555), Government's Exhibit No. 26I (555, 556, 557, 558), Government's Exhibit No. 26J (559, 560), Government's Exhibit No. 26K (560, 561), Government's Exhibit No. 26L (561, 562, 563, 564) Government's Exhibit No. 26L-1 (565, 566), Government's Exhibit No. 26M (566, 567, 568, 569), Government's Exhibit No. 26N (570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580,

581, 582, 583, 584), Government's Exhibit No. 26O (585, 586), Government's Exhibit No. 26P (586, 587), Government's Exhibit No. 26Q (587, 588, 589), Government's Exhibit No. 26R (589, 590), Government's Exhibit No. 26S (590, 591), Government's Exhibit No. 26T (591, 592), Government's Exhibit No. 26U (593, 594, 595, 596, 597), Government's Exhibit No. 26V (597, 598, 599, 600, 601, 602, 603), Government's Exhibit No. 26W (603, 604, 605, 606, 607, 608), Government's Exhibit No. 26Y (608, 609, 610, 611, 612, 613), Government's Exhibit No. 63 (618).

Wallace v. U. S. 245 Pac. 300;

U. S. v. Babcock, 3 Dillon 581;

Miller v. U. S. 133 Fed. 337;

Pope v. U. S. 289 Fed. 312.

IV.

Many of the books, records, cancelled checks, and check stubs received in evidence were not admissible in evidence for the reasons set forth under proposition III above, and for the further reason that no materiality was pointed out when such books and records were offered. There was no proof that such books and records and the entries therein were kept in the regular course of business. There was no proof that it was the regular course of business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter, and there was no compliance with the requirements of Section 695, Title 28 USCA, and as construed by the District Court this section is unconsti-

tutional. (Assignments of Error III, IV, V, VI, VIII, XIII, XIV, XV, XVI, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV,XXVI, XXVII, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, LIX, LXVII) (165, 166, 167, 168, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 202, 208).

The Assignments of Error dealt with in this phase of the argument covers the exceptions to the admission in evidence by the Court of all of the various books and records of the Union Reserve Life Insurance Company and the State Securities Corporation, consisting of cash books, ledgers, journals, cancelled checks, check stubs, minute books, receipts, work sheets made by Government's witness Hair, and other documents and records introduced in evidence over the objection of this appellant. (See Appendix for Assignments of Error in Full, pp. 101-116)

DID THE COURT ERR IN ADMITTING IN EVIDENCE BOOKS, RECORDS AND CANCELLED CHECKS AND CHECK STUBS FOR THE FURTHER REASON THAT NO MATERIALITY WAS SHOWN AND THERE WAS NO PROOF THAT SUCH BOOKS AND RECORDS AND THE ENTRIES THEREIN WERE KEPT IN THE REGULAR COURSE OF BUSINESS, AND NO COMPLIANCE WITH THE REQUIREMENTS OF SECTION 695, TITLE 28, U.S.C.A. AND FOR THE REASON THAT AS CONSTRUED BY THE DISTRICT COURT SAID SECTION IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE SIXTH AMEND-

MENT TO THE CONSTITUTION OF THE UNITED STATES?

In presenting this question to the Court we realize that under proper proof books of account and record are admissible in evidence in criminal cases. However, certain rules exist which must be strictly followed before such books and records may be admitted in evidence against one who did not make the entries in the books or did not make the records. This rule is concisely stated in 16 C. J. 743, sec. 1527, and is as follows:

> "The rule that entries made by a third person in the regular course of business contemporaneously with the transaction which they record are competent evidence of the facts shown thereby, when the person making the entries has personal knowledge of the subject, or when information respecting it is regularly reported to him, *and when the correctness of the entries is verified by the oath of the person who made them.*"

In discussing this question it must also be kept in mind that the same rule also applies to the objection to the introduction of exhibits mentioned in the foregoing assignments of error that was applied and was discussed in the question as to the admissibility of acts and declarations of alleged co-conspirators where no proof of a conspiracy is had and where it is not shown that the appellant had any knowledge of the acts and declarations of the alleged co-conspirators.

It is contended by the appellant that the Court in the instant case did not properly apply the rule as laid down

in Section 695, Title 28, U. S. C. A. relative to the introduction of books and records, that such misconstruction and misappliance of the statute resulted and does result in making the act unconstitutional, because it is violative of the sixth amendment to the Constitution of the United States, in that it permits the introduction of evidence against the defendant by witnesses with whom he is not confronted and witnesses whom he is not afforded an opportunity to cross-examine.

It has always been the law in the United States and in the various states, that in criminal cases the Government or a state could not present any testimony against a defendant except it be the testimony of a witness present in court, under oath, on the witness stand, and subject to examination by the defendant. Even in the introduction of official records there must be evidence that the record is the official record, one required to be kept under the law, and the record must be properly identified as being the record kept under such law.

In the instant case there was no attempt on the part of the Government to fully comply with this rule of law. An examination of the transcript of record indicates that many, if not all, of the exhibits complained of in the above assignments of error were in part made by some person who was not present in court to identify the entries, or a portion of the record not made by the person testifying. The evidence shows that so far as this appellant is concerned, he had little, if anything, to do with the making of any of the books or records introduced in evidence, and yet they were introduced against him in an effort to prove the commission of a criminal

offense, and, based on such books and records, he was convicted on the sixth count of the indictment.

It is the further contention of this appellant that, in so far as this appeal is concerned, all of the books and records complained of and introduced in evidence against this defendant were improperly submitted to the consideration of the jury and should not have been considered by the jury against this appellant, because the jury acquitted him on the first five counts in the indictment and by such acquittal found that he did not have any part in the scheme or device to defraud, that he did not have any part in the doing of any of the things set forth in the first five counts in the indictment and having so decided by their verdict of not guilty and having acquitted this defendant of all of such acts, the jury could not then have found this defendant guilty on the sixth count.

It will be noted from the testimony of Willis G. Ethel (245 to 260 inclusive) that no attempt was made to show by any witness that the documents were such as were entitled to be admitted in evidence against this defendant. The method used by counsel for the Government in identifying these purported records is best shown by the following excerpt from the testimony of Willis G. Ethel (249), which is as follows:

> Thereupon counsel for plaintiff asked that a bundle of papers be marked as one exhibit and said bundle was marked Government's Exhibit No. 5 for identification. The Witness Ethel was then shown Government's Exhibit No. 5 for identification, consisting of several documents and testified as fol-

lows: These documents are the records of the Corporation Commission in reference to the State Securities Corporation.

Nowhere in the testimony is there any showing by any witness that these records were public records, required to be kept by the Corporation Commission; there was no showing as to who made the records; there was no showing as to whether or not some of the records were made by the Corporation Commission or by some individual in no way connected with Corporation Commission, but a bundle of papers was handed the witness with the above identification being the only identification made of said papers, and thus Government's Exhibit No. 5 was admitted in evidence over the objection of this defendant.

An examination of the record shows that this was the procedure following in most instances where exhibits were intrduced. In some instances the record was presented to a witness who kept only a portion of the record and had no knowledge of who kept the other portions and had no knowledge as to whether the records were kept in the regular course of business or made in some other manner; there was no evidence that the person making the record knew that the transactions were correct or that they were correctly entered in the records.

As to one witness, King Wilson, who identified Exhibits 8, 9, 10, 11, 12 and 14 (261, 262, 263, 264, 265, 266), only one of which exhibits was offered in evidence during the time said witness was on the stand and available for cross-examination, the Court refused to keep

said witness in the jurisdiction of the Court where he could be cross-examined by the defendant when such exhibits were offered in evidence, although the United States attorney objected to the cross-examination of this witness on exhibits not in evidence (261 to 277 inclusive), and the Court later permitted the introduction in evidence of said exhibits over the objection of this defendant.

It is clear, therefore, from the law and the evidence, that the Court erred in admitting in evidence the exhibits mentioned in the appellant's assignments of error.

For the convenience of the Court, the pages in the transcript of record showing the identification of the exhibits and the exhibits themselves are grouped:

Government's Exhibit No. 5 (249, 250, 251, 252),
Government's Exhibit No. 6 (252, 253, 254, 255, 256),
Government's Exhibit No. 12 (265, 266, 267),
Government's Exhibit No. 8 (296),
Government's Exhibit No. 28 (297),
Government's Exhibit No. 11 (299),
Government's Exhibit No. 10 (300),
Government's Exhibit No. 7 (305),
Government's Exhibit No. 29 (306),
Government's Exhibit No. 30 (307),
Government's Exhibit No. 14 (309),
Government's Exhibit No. 17 (310),
Government's Exhibit No. 15 (311),
Government's Exhibit No. 19 (312),
Government's Exhibit No. 22 (313),
Government's Exhibit No. 24 (315),
Government's Exhibit No. 18 (350),

Government's Exhibit No. 21 (352),
Government's Exhibit No. 23 (353),
Government's Exhibit No. 57 (513),
Government's Exhibit No. 58 (515).

V.

The Court erred in refusing to keep the Government's witness King Wilson in attendance upon the Court for cross-examination by the appellant when the books and records which he had identified should be by the Government offered in evidence, and in excusing him from further attendance upon the Court over the objection and exception of appellant. (Assignment of Error No. IX 169, 170).

ASSIGNMENT OF ERROR NO. IX

The Court erred in refusing to keep the Government's witness King Wilson in the jurisdiction of the Court for cross-examination by the defendants when the books and records which he had identified should be by the Government offered in evidence, for the reason that at the time the Court excused the witness King Wilson he had identified some seven Exhibits consisting of the books of account and records. The said books had not been offered in evidence and no materiality of any figure in the books, or the relevancy thereof had been pointed out, and this defendant appellant was entitled to cross-examine the said Government witness King Wilson as to any entries made by him in such books, and generally as to such books and his knowledge of the transactions therein reflected and claimed by the Government to be material, when the Government should point out the claimed materiality thereof,

or introduce the same in evidence, and in excusing said witness from attendance on the Court, to which ruling defendant appellant duly excepted. (169, 170)

DID THE COURT ERR IN REFUSING TO KEEP THE GOVERNMENT'S WITNESS KING WILSON IN ATTENDANCE UPON THE COURT FOR CROSS-EXAMINATION BY THE APPELLANT WHEN THE BOOKS AND RECORDS WHICH HE HAD IDENTIFIED SHOULD BE BY THE GOVERNMENT OFFERED IN EVIDENCE, AND IN EXCUSING THE SAID WITNESS FROM FURTHER ATTENDANCE UPON THE COURT OVER THE OBJECTION AND EXCEPTION OF THE APPELLANT?

In discussing this assignment of error the Court's attention is called to the entire testimony of the witness King Wilson (261 to 277). It will be noted that the witness said that he resided in Louisville, Kentucky. He then proceeded to identify portions of certain exhibits, being the books of account of the Union Reserve Life Insurance Company, being Exhibits 8, 9, 10, 12, 13, 14 and 15. During the time this witness was on the stand only one of said exhibits, Exhibit No. 12, was offered in evidence. At the close of the witness's testimony counsel for the Government announced that the witness was going to be excused so that he could leave and go back to his business in Louisville, Kentucky. Objection was made to permitting the witness to leave the jurisdiction of the Court until the exhibits identified by the witness were introduced in evidence so that the witness might be cross-examined as to said

exhibits. An attempt was made to ask the witness on cross-examination some of the questions relative to entries in one of the books (270, 271), and counsel for the Government objected because the book had not been introduced in evidence. Notwithstanding the objection of the defendant the Court refused to keep the witness within the jurisdiction of the Court and permitted him to be excused and leave the State of Arizona at that time.

This was clearly a violation of the sixth amendment to the Constitution of the United States which guarantees to the accused in a criminal case the right to be confronted with the witness against him.

The rule laid down by the courts as to the right of cross-examination is concisely stated in 70 C. J. 611, sec. 779, as follows:

> "A party has a right to cross-examine witnesses who have testified for the adverse party, and this right is absolute and not a mere privilege, and, unless subject to cross-examination, a witness cannot testify, *and it is not within the discretion of the court to say whether or not the right will be accorded;*"

The framers of the sixth amendment to the Constitution and the people of the United States who adopted it were vitally aware of the great need of a rule of law of this kind; in giving to the accused a right of trial by jury they also realized that the accused had a right to be confronted with the witness against him; that he should not be tried and convicted on hearsay testimony

because of the uncertainty of it, and that a defendant should have a right by cross-examination to determine everything that the witness knew about the transaction. The courts, from the time of the adoption of the sixth amendment, have been very zealous in enforcing its provisions. The reason for that has been amplified in many decisions of the United States supreme Court, as well as the state courts. In the case of *State v. Ritz,* 211 P. 298, 65 Mont. 180, 187, the court, speaking of the right of cross-examination, said:

> "Cross-examination is the most potent weapon known to the law for separating falsehood from truth, hearsay from actual knowledge, things imaginary from things real, opinion from fact, and inference from recollection, and for testing the intelligence, fairness, memory, truthfulness, accuracy, honesty, and power of observation of the witness. It has become a truism in the legal profession that 'The testimony of a witness is not stronger than it is made by his cross-examination.' "

And again, in speaking of the importance of preserving the right unimpaired, the court in the case of Prewitt v. State, 126 So. 824, 156 Miss. 731, said:

> "It is of the utmost importance in the administration of justice that the right of cross-examination be preserved unimpaired. It is the law's most useful weapon against fabrication and falsehood. As a test of accuracy, truthfulness, and credibility of testimony, there is no other means as effective."

In the instant case the trial court utterly disregarded the defendant's right of cross-examination, refused to

keep the witness within the jurisdiction of the court until the exhibits which he had identified had been admitted in evidence so that he might be cross-examined on said exhibits, arbitrarily at the instance of counsel for the government and over the objection of the defendants permitted the witness to leave the State of Arizona and return to Louisville, Kentucky. Later on the record shows that these exhibits were offered and introduced in evidence over the objection of the defendant and which objection again raised the question that defendant had been denied the right to cross-examine the witness who identified certain portions of the exhibits (296, 300, 299, 266, 302, 309, 311).

It is clear from the cases dealing with this question that the court has no discretion in the matter and the right of cross-examination being absolute, the Court committed reversible error when it refused to compel the attendance of the witness King Wilson until the exhibits identified by the witness were introduced in evidence, in order that the witness might be cross-examined and, again, the Court committed reversible error when it received in evidence over the objections of the defendant the exhibits identified by the witness King Wilson and about which the witness could not be cross-examined by the defendant.

Alford v. U. S. 51 S. Ct. 218, 282 U. S. 687, 75 Law Ed. 624;

Sossock v. U. S. 63 Fed. (2d) 511;

Minner v. U. S. 57 Fed. (2d) 506;

Gallaghan v. U. S. 299 Fed. 172;

Kirk v. U. S. 280 Fed. 506.

VI.

The action of the Court in overruling the appellant's objections to the testimony of witness E. P. Hair on rebuttal concerning transactions between the Union Reserve Life Insurance Company and Marquis, Cornes & Marquis and J. Elmer Johnson was clear and prejudicial error. (Assignments of Error LXIX, LXX, LXXI, 209, 210).

ASSIGNMENTS OF ERROR NO. LXIX, LXX, LXXI.

Assignments of Error Nos. LXIX, LXX and LXXI (209, 210, 211) are objections to the testimony of the witness E. P. Hair, over the objection of the appellant Canning, concerning entries in books of Marquis, Cornes & Marquis and the Union Reserve Life Insurance Company, and transactions purportedly had with one J. Elmer Johnson, and the introduction of Government's Exhibit No. 68 and 69 in evidence, being a copy of a letter, and a work sheet made by witness E. P. Hair.

(See appendix for Assignments of Error in full pp. 116-118)

DID THE COURT ERR IN RECEIVING OVER APPELLANT'S OBJECTIONS TESTIMONY OF THE GOVERNMENT'S WITNESS E. P. HAIR ON REBUTTAL CONCERNING TRANSACTIONS BETWEEN THE UNION RESERVE LIFE INSURANCE COMPANY AND MARQUIS, CORNES & MARQUIS AND J. ELMER JOHNSON?

In what counsel for the government termed rebuttal testimony E. P. Hair was called on behalf of the government and, over the objection of the defendant, was per-

mitted to testify as to certain alleged transactions between one J. Elmer Johnson and the State Securities Corporation and the Union Reserve Life Insurance Company. (880 to 895) An examination of the testimony in this case fails to reveal that J. Elmer Johnson was a witness in the case, either for the Government or for the defense.

The testimony offered and given by the witness Hair was in no sense rebuttal testimony, because there had been no testimony on the part of any witness in the case as to J. Elmer Johnson. J. Elmer Johnson was not charged in the indictment with being a party to any of the alleged acts charged in said indictment nor in any count thereof.

An examination of this testimony clearly shows that it was not introduced in contradiction of any testimony in the case. For some reason counsel for the government conceived the idea that impeachment testimony should be introduced against J. Elmer Johnson. No attempt was made by counsel for the government to ask the witness Hair any questions contradictory of any statements made by any witness or introduced in evidence. Clearly it was an attempt by counsel for the government to inject extraneous matters into the record for the purpose of prejudicing defendant, and the Court committed error in not sustaining defendant's objection to this testimony, the right of rebuttal only existing as to testimony contradictory to testimony introduced by the opposite party in the examination of his witness.

16 C. J. 867, sec. 2185.

VII.

The appellant's motions for directed verdict of not guilty should have been granted. (Assignments of Error LXIV and LXXII (205, 206, 207, 211, 212, 213).

ASSIGNMENTS OF ERROR NO. LXIV, LXXII.

Assignments of Error No. LXIV and LXXII (205, 206, 207, 211, 212, 213) concern the motion of appellant for directed verdict at the close of the government's case and the motion of appellant for a directed verdict at the close of all of the testimony. (See Appendix for Assignments of Error in full, pp. 118-122)

DID THE COURT ERR IN DENYING APPELLANT'S MOTIONS FOR DIRECTED VERDICT, MADE AT THE CLOSE OF GOVERNMENT'S CASE AND AT THE CLOSE OF THE WHOLE CASE?

In presenting these Assignments of Error it is necessary to examine all of the evidence relative to the connection of the defendant Canning with the entire transaction in order to determine if there is sufficient evidence in the record to authorize or justify the Court in submitting the case to the jury on the charges set out in the indictment. In examining the testimony relative to this defendant we should keep in mind the rule that the Court should direct a verdict where there is no competent evidence reasonably tending to sustain the charge or where the evidence is insufficient to overcome the presumption of innocence or to show defendant's guilt beyond reasonable doubt.

The evidence in this case shows (259, 260) that this defendant was neither a stockholder, officer or director of the State Securities Corporation at the time the corporation was organized or at any time thereafter. The evidence also shows that the defendant Canning was never a stockholder, officer or director in the Union Reserve Life Insurance Company. And the undisputed evidence shows that he had nothing to do with the policy, management or control of either company; that he never sold or attempted to sell any stock, bonds or insurance in either company; that his employment with the State Securities Corporation commenced in 1930; that he took care of some accounting for both companies and did some accounting work for both of them until they were in the hands of the receiver (731); that all he had to do with the accounting of the Union Reserve Life Insurance Company was to make the closing entries at the end of the year (262); that he did not open up the books of the State Securities Corporation, but that he kept the books and records of the State Securities Corporation until 1933 (743); that after 1933 no books were kept except the cancelled checks and check stubs and memoranda kept in the office; that this defendant had all of these things furnished him in making up the annual account of State Securities Corporation (744, 745); that of the entries made in Government's Exhibit No. 8, this defendant only made the closing entries on pages 202, 203, 204, 205 (295) that in Government's Exhibit No. 12, the closing entries on pages 239, 240, 241, 242, were the only part of the book which was in the hand writing of defendant Canning and that these pages contained a summary or recapitulation of the years, made by defendant Canning, and from which

statements to the Arizona Corporation Commission, Exhibit No. 7, for the year 1936, was taken (302). The evidence of the witness E. P. Hair, Government's accountant, is that the statements made by defendant Canning in the annual reports to the Corporation Commission of the financial condition of Union Reserve Life Insurance Company accurately reflected what appeared in the books of the company, in the ledger and cash journal; that the item of $7150 Home Owner's Loan bonds appeared in the ledger of the Union Reserve Life Insurance Company; that the increase in the mortgages in the amount of $11,000 was reflected in the ledger of the Union Reserve Life Insurance Company; that the statement in all its aspects clearly reflects the cash books and the ledger of the Union Reserve Life Insurance Company (637, 638). This is the burden of the testimony throughout the entire case. Nowhere is there any evidence which directly or by implication can be said to even cast any stain upon defendant Canning. There is no direct evidence, nor is there any evidence from which the implication or presumption might arise that the defendant Canning took any part in the formation of any scheme or device to defraud, if such scheme or device was made. There is no direct evidence, nor is there any evidence from which presumption or implication might arise that defendant Canning had anything to do with the use of the mails in the furtherance of any scheme or device to defraud, or for any other purpose in so far as the other defendants are concerned, or in so far as the State Securities Corporation or Union Reserve Life Insurance Company are concerned. All of the evidence which shows any connection of defendant Canning with either of these two companies shows conclusively that

he was an accountant, occasionally employed by the two companies for the purpose of auditing the books and, from the books, making financial statements. There is no competent evidence reasonably tending to sustain the charge in any count of the indictment, nor is there any evidence sufficient to overcome the presumption of innocence of this defendant, or to show this defendant guilty beyond reasonable doubt.

Where such situation exists in the testimony it is clearly the duty of the trial court to direct the verdict. Particularly was this true in the case at bar, as shown by the fact that the jury found the defendant Canning not guilty on the first five counts in the indictment. Having done this, it clearly appears from the whole record of the evidence that the Court should have directed the verdict on all six counts in the indictment, because, by the acquittal of defendant Canning by the jury on the first five counts, there was then nothing left to sustain a verdict of guilty on the sixth count.

16 *C. J.* 935, sec. 2299;

Salinger v. U. S. (CCA 8 1927) 23 F. (2d) 48;

Tucker v. U. S. (CCA 8 1925) 5 F. (2d) 818;

Beck v. U. S. (CCA 8 1929) 33 D. (2d) 107;

Kritcher v. U. S. (CCA 2 1927) 17 F. (2d) 704;

Freeman v. U. S. (CCA 3 1927) 20 F. (2d) 748;

In a search of the authorities the case which we found nearest in fact to the instant case is *Scheib v. U. S.*

(CCA 7 1926) 14 Fed. (2d) 75. The facts in this case were that among the defendants convicted of a scheme to defraud were two auditors who had audited the books of the fraudulent company, the audit purported to be an audit of the books only and did not purport to be an appraisal or certification of the values. The audit showed a surplus which was due to write-up of values but the auditors had no connection to the write-ups which were reflected in the books. The Court, in reversing the conviction of the two auditors, used the following language:

> "It does not appear that Willis and Haight had any prior contact or dealings with Hawkins, or any interest in him or his companies, and for anything that was shown to the contrary, they, residing in Indianapolis, were employed in the regular way to do this work, and it does not appear that they were to receive or did receive for their work anything beyond the usual and ordinary compensation for such service. While a report so predicated, unaccompanied by an appraisal, can give little assurance to the public as to the true condition of the concern itself, apart from that of its books and records, nevertheless, so far as regards the items here particularly relied on to indicate criminality, the evidence shows they were taken from the books and records of the company, just as they purport to be, and we are unable to perceive in the transcript any evidence of criminal conduct of these two."

A comparison of the facts in the instant case with the remarks of the court as to the facts in the case just mentioned indicates a very close parallel. In the in-

stant case the evidence heretofore referred to, of the Government's witness Hair, is that the audit and statements made by the appellant Canning correctly reflected the books and records of the company. That being true, it is impossible to see anything in the evidence to connect the appellant with any scheme or device to defraud.

VIII.

The Court erred in instructing the jury and in refusing appellant's requested instruction. (Assignments of Error Nos. LXXIV, LXXV, LXXVI, LXXVII, LXXVIII, LXXIX, LXXX, LXXXI, LXXXII, LXXXIII, LXXXIV, LXXXV, LXXXVI, LXXXVII, LXXXVIII, LXXXIX, XC, XCI, XCII, XCIII, XCIV, XCV, XCVI, XCVII 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236).

ASSIGNMENTS OF ERROR NOS. LXXIV, LXXV, LXXVI, LXXVII, LXXVIII, LXXIX LXXX, LXXXI, LXXXII, LXXXIII, LXXXIV, LXXXV, LXXXVI, LXXXVII, LXXXVIII, LXXXIX, XC, XCI, XCII, XCIII, XCIV, XCV, XCVI, XCVII.

In presenting this argument it logically falls into two classifications: The first covering Assignments of Error Nos. LXXIV, LXXV, LXXVI, LXXVII, LXXVIII, LXXIX and LXXX (213, 214, 215, 216, 217, 218, 219, 220, 221) which are instructions given by the court and to which exception was taken by the defendant appellant Canning before the jury had retired to consider its verdict (944, 945, 946, 947, 948, 949 and 950) and dealt

with the adoption by one defendant of statements or representations made by others, the duty of individual jurors in this case, the instructions relative to the application of acts of Congress to this case, the proof necessary to establish the appellant's connection with any scheme, the terms of the act under which this indictment was found, the duty of employees, and the right of a defendant to testify in his own behalf. The second classification deals with the rest of the Assignments of Error specified under this heading (LXXXI, LXXXII, LXXXIII, LXXXIV, LXXXV, LXXXVI, LXXXVII, LXXXVIII, LXXXIX, XC, XCI, XCII, XCIII, XCIV, XCV, XCVI, XCVII, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236) and are instructions on practically all phases of the case, which this defendant appellant insists correctly state the law and which this defendant appellant insists he had a right to have given expressly for him in order that the jury might properly consider the testimony as it applied to him. (See Appendix for Assignments of Error in full, pp. 122-142)

DID THE COURT ERR IN INSTRUCTING THE JURY AND IN REFUSING APPELLANT'S REQUESTED INSTRUCTION?

The appellant insists that the part of the instruction complained of in Assignment of Error No. LXXIV (213, 214) does not correctly state the law, because as there set out and as given by the Court it completely ignores any question of the knowledge of the person adopting the statements or representations as to the falsity of such representations and statements. It makes a flat state-

ment without any regard to the qualification which must be placed thereon, that before any responsibility attaches to the person who incorporates such statements or representations in their literature, he must either know such representations and statements are false or such incorporation must be done with a wanton and reckless disregard as to their truth or falsity. The instruction was entirely misleading and under it the jury had no choice in the matter, no difference what the evidence showed. That this was prejudicial to the defendant Canning cannot be doubted, because of the Government's attempt to prove that a portion of Government's Exhibit No. 7, being the annual report for 1936, filed by the insurance company with the Corporation Commission, contained many figures not prepared or made in said report by the defendant appellant Canning, the said report having been signed by the appellant Canning. Under such circumstances and under this instruction, the jury was undoubtedly mislead.

In the instruction complained of in Assignment of Error No. LXXV (214, 215, 216) the Court attempted to instruct the jury as to how the jury should deliberate. In so doing the Court used language throughout the entire part of the instruction complained of which tended to impress upon the jury, and each individual member thereof, that he should not follow his own opinion made up from the law and the evidence, but that he should consider that the other members of the jury who differ from him were undoubtedly more nearly right than he and that he should follow their line of thinking. The Court even went so far as to say that in theory if every juror followed the Court's instruction as to how he

should make up his mind a hung jury would be impossible. But the final cap sheaf was placed upon the error in the instruction in the last two sentences, which read as follows:

> "Nothing results from your oath requiring you to reason differently or change your mature method of reasoning from the course you would pursue in your private affairs in determining a serious question. The effect of your official position as jurors is to face you with an obligation to calmly and seriously study the evidence, to ascertain the clear existence of fundamental facts asserted to have been shown in the evidence and to correlate them properly into a line of proof so that, as jurors, you are able to say that the ultimate facts of the guilt charged against a defendant is shown to a moral certainty, whereas, if it were a private matter, you might be satisfied with a solution which is supported by a mere preponderance of evidence."

In the first place jurors cannot apply the same line of reasoning to their deliberations as jurors that they apply to their own private business affairs. In consideration of their verdict as jurors they are bound to consider only the law and the evidence. They are not privileged to do as they do in their private affairs, go into realms of speculation and consider what the ultimate effect of their decision will be at some time in the future, or as to what the effect might be upon this person or that person, and as to what certain facts may develop when an investigation is made thereof, and many other things which occur in every day life and

business affairs. If jurors followed this instruction, as laid down by the Court, in their deliberations no one would be safe who is charged with a criminal offense. One of the greatest safeguards which surrounds a defendant in a criminal case is that the jury took an oath to render its verdict based upon the law and the evidence. The greatest vice in this instruction is the last sentence quoted above, for in that the Court states flatly that the effect of the position as a juror is to find the ultimate facts of the guilt charged against a defendant. It will be noted that the instruction opened with a short sentence, which says that no juror should vote for the conviction of a defendant as long as he entertains a reasonable doubt of the defendant's guilt, and then closes with a direction to the jury to correlate the facts that they may be able to say that the defendant is guilty. It is hard to conceive an instruction which would be more prejudicial to the defendant in a criminal case than the instruction complained of.

In the instruction complained of in Assignment of Error No. LXXVI (217, 218) the Court goes entirely outside of the record and gives an instruction which is confusing and misleading and leaves in the minds of the jury the inference that fraud existed regardless of the evidence and over emphasizes the question of fraud in undertaking to set out the gist of the evidence.

In the instruction complained of in Assignment of Error No. LXXVII (218) the instruction is bad because it totally ignores the question of fraud in the inception and leaves out the question of intent, which is a necessary element at the time of the inception of the scheme, if any existed.

The instruction complained of in Assignment of Error No. LXXVIII (218, 219) does not correctly state the law, is ambiguous and misleading and incomplete, and completely ignores the necessary element of an intent to defraud.

The instruction complained of in Assignment of Error No. LXXIX (219, 220) incorrectly states the law. No where in the law is it found that it is the duty of every employee to know the nature of the business being transacted by his principal. Even if the principle of law laid down in the instruction were correct, still the Court lost sight of the fact that this appellant was employed by the State Securities Corporation and by the Union Reserve Life Insurance Company, who were his principals, and neither of which corporation is charged with any wrong doing. If this instruction of the court was carried to its logical conclusion then a duty would devolve upon every man, ditch digger, or otherwise, to inquire into and ascertain the nature of the business which his employer was conducting in order that he might protect himself from criminal prosecution if it later developed that the man for whom he worked in the capacity of a laborer had been using some branch of his business for the purpose of defrauding someone. We cannot believe this Court will sanction that statement of the law.

The instruction complained of in Assignment of Error No. LXXX (220, 221) is the stock instruction usually given, except the last sentence, which is as follows:

> "Where a witness has a direct personal interest in the result of a case, especially in a criminal case,

the temptation may be strong to color, pervert or withhold the facts."

Clearly this gratutious statement in this instruction, after having given a complete instruction, was intended to impress upon the minds of the jury that the defendant appellant in this case had colored, perverted or withheld the facts. The instruction was highly prejudicial.

The questions presented by the remainder of the Assignments of Error discussed under this argument (LXXXI, LXXXII, LXXXIII, LXXXIV, LXXXV, LXXXVI, LXXXVII, LXXXVIII, LXXXIX, XC, XCI, XCII, XCIII, XCIV, XCV, XCVI, XCVII, 222 to 236 inclusive) are that this defendant appellant, owing to the peculiar position which he occupied in the whole transaction, that is, that he was merely an occasional employee and was not one who had any concern in the formulation of the policy of the companies, management, direction, control or operation of the companies, was entitled to have instructions given separately, which clearly set forth the law in so far as it related to him in the light of the evidence. He was not in the same position with the other defendants, who were officers, directors and stockholders in the corporations. To say that his conduct, in view of all the evidence, should be considered under the general instruction applied to the other defendants was clearly prejudicial error. There were no instructions given which defined the appellant's position or connection with the other defendants. Under all the evidence in the case, the appellant was employed, not by any of the other defendants, but by the two corporations. Certainly he was

entitled to have some instructions given on his behalf which clearly set out the law relative to the appellant as an employee of the corporations rather than to have instructions which left the jury to find that no difference by whom he was employed he was responsible for the acts and declarations of the other defendants.

IX.

The Court erred in refusing to strike from the testimony the exhibits admitted in evidence on behalf of the Government. (Assignments of Error Nos. IV, VII, XVII, XXVIII, LXV, LXVI, LXVII, LXVIII, LXXIII, 166, 167, 168, 179, 180, 186, 207, 208, 209, 213).

ASSIGNMENTS OF ERROR NOS. IV, VII, XVII, XXVIII, LXV, LXVI, LXVII, LXVIII, LXXIII.

The Assignments of Error relied upon and discussed under this division of the argument have to do entirely with the motion to strike the Government's Exhibits in evidence which were admitted in evidence over defendant's objection. (See Appendix for Assignments of Error in full, pp. 142-146)

DID THE COURT ERR IN REFUSING TO STRIKE FROM THE TESTIMONY THE EXHIBITS ADMITTED IN EVIDENCE ON BEHALF OF THE GOVERNMENT?

It is the contention of the appellant that the Court erred in refusing to strike from the evidence at the close of the Government's case and at the close of the

whole case the exhibits offered and received in evidence over the objection of this defendant, for the reason that at the close of the Government's evidence, and at the close of all the evidence, there had been no proper foundation laid for the introduction of the exhibits and, as to this defendant, they were inadmissible, being pure hearsay, and that said exhibits had not been properly identified as required by law, and that there had been no proof of any participation by this defendant in any scheme or device to defraud, nor any use of the mails in furtherance of such scheme or device, or that this defendant had entered into any conspiracy with any of the other defendants, or any other person. In addition to these statements, the Court's attention is called to the argument presented under Subdivision IV of the argument in this brief, which this appellant asks be applied equally to this portion of the argument.

CONCLUSION

It is respectfully submitted that in view of the errors complained of and the law relative thereto, that this Court should reverse the conviction of appellant and remand the case with directions to the United States District Attorney to dismiss the indictment and order the release of this appellant, Earl Canning.

Respectfully submitted,

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E. G. FRAZIER
Attorneys for Defendant
Appellant Earl Canning

Appendix

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APPENDIX

ASSIGNMENTS OF ERROR

—*—

SUBDIVISION NO. I OF ARGUMENT

ASSIGNMENT OF ERROR NO. I

The Court erred in overruling this defendant's demurrer to the indictment upon the grounds and for the reason that the said indictment was and is insufficient in the following particulars:

(a) Said indictment does not, nor does any count thereof, state facts sufficient to constitute an offense against the United States or the laws thereof.

(b) Said indictment does not, nor does any count thereof state facts sufficient to constitute an offense by this defendant against the United States or the laws thereof.

(c) The first count of said indictment does not state facts sufficient to constitute an offense against the United State or the laws thereof.

(d) The first count of said indictment does not state facts sufficient to constitute an offense by this defendant against the United State or the laws thereof.

(e) The second count of said indictment does not state facts sufficient to constitute an offense against the United States or the laws thereof.

(f) The second count of said indictment does not state facts sufficient to constitute an offense by this defendant against the United States or the laws thereof.

(g) The third count of said indictment does not state facts sufficient to constitute an offense against the United States or the laws thereof.

(h) The third count of said indictment does not state facts sufficient to constitute an offense by this defendant against the United States or the laws thereof.

(i) The fourth count of said indictment does not state facts sufficient to constitute an offense against the United States or the laws thereof.

(j) The fourth count of said indictment does not state facts sufficient to constitute an offense by this defendant against the United State or the laws thereof.

(k) The fifth count of said indictment does not state facts sufficient to constitute an offense against the United States or the laws thereof.|

(l) The fifth count of said indictment does not state facts sufficient to constitute an offense by this defendant against the United States or the laws thereof.

(m) The sixth count of said indictment does not state facts sufficient to constitute an offense against the United States or the laws thereof.

(n) The sixth count of said indictment does not state facts sufficient to constitute the offense by this defendant against the United States or the laws thereof.

(o) Said indictment does not, nor does any count thereof state facts sufficient to constitute an offense described in Section 37 of the Criminal Code (18 U. S. C. A., sec. 88).

(p) Said indictment does not, nor does any count thereof state facts sufficient to constitute the offense described in Section 37 of the Criminal Code (18 U. S. C. A., sec. 88.)

(q) Said indictment does not, nor does any count thereof, state facts sufficient to constitute any scheme or artifice to defraud or for obtaining money or property by means of false, misleading or fraudulent representations, pretenses or promises.

(r) Said indictment does not, nor does any count thereof, state facts sufficient to constitute any conspiracy, combination or confederation to commit any offense against the United States or the laws thereof.

(s) Said indictment, and each separate count thereof, is duplicitous in that each of said counts states the commission of more than one offense against the United States or the laws thereof, if any such offense is stated at all.

(t) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite as not to apprise this defendant of the offense or offenses with which he is sought to be charged.

(u) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite that this defendant cannot properly prepare his defense thereto.

(v) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite as to be of no protection to this defendant in the event of a second prosecution for the same offense or offenses sought to be charged therein.

(w) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite as not to apprise this defendant of the part or parts of said alleged scheme or artifice to defraud, if any, with which he is charged with devising, intending to devise, or participating in.

(x) Said indictment and each separate count thereof, is so vague, uncertain and indefinite as not to apprise this defendant of what participation, if any, he is charged with having had in the mailing, causing to be mailed, delivery, or causing to be delivered, of any of the indictment letters.

(y) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite as not to apprise this defendant of what part or parts of said alleged scheme or artifice to defraud, if any, were or are fraudulent or false or illegal or wrongful.

(z) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite as not to apprise this defendant of how, or why, or by reason of what facts, if any, the various parts alleged to have been embraced in said alleged scheme or artifice to defraud, were or are, or any of them was or is, fraudulent or false or illegal or wrongful.

(1-a) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite as not to apprise this defendant whether he is charged with devising or intending to devise only one scheme or artifice to defraud, or more than one such scheme.

(1-b) Said indictment, and each separate count thereof, is so vague, uncertain and indefinite as not to apprise this defendant of how, or in what manner or by reason

of what facts, if any, the alleged scheme or artifice to defraud, or any part thereof, tended to, or did, defraud all or any of the alleged "victims" referred to in said indictment. (158, 159, 160, 161, 162).

SUBDIVISION NO. II OF ARGUMENT

ASSIGNMENT OF ERROR NO. II

The Court erred in overruling the objections of this defendant to the Bill of Particulars, as filed herein, and in denying this defendant's motion for an order requiring the government to supplement the same, for the reasons,

(a) That paragraphs I, II, III, IV, V, IX, X, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, and XXVIII of the Bill of Particulars, as filed, and each of them, severally and separately are evasive, indefinite, incomplete and constitute conclusions of law and do not fully or fairly disclose the information sought by this defendant in his motion for a Bill of Particulars, and the motion of this defendant requiring the government to file a supplemental Bill of Particulars fully and fairly setting forth the information requested by this defendant in his motion for a Bill of Particulars should have been granted.

(b) That paragraphs VI, VII, VIII, XI, XII, XIII, XIV, XV, XXXIX, XLIV, XLVI, XLVII, XLVIII of the Bill of Particulars, as filed, severally and separately are evasive, indefinite, uncertain, incomplete and constitute conclusions of law and do not fairly disclose the information requested by this defendant in his motion for Bill of Particulars, and the Court erred in

denying this defendant's motion for an order requiring the government to file a supplemental Bill of Particulars fully, fairly and completely disclosing the information requested by this defendant in his motion for a Bill of Particulars.

(c) The Bill of Particulars, as filed, discloses that the financial statement referred to in paragraph numbered 5 of the sixth count of the indictment, and the financial statement referred to in paragraph numbered 3 of the sixth count of the indictment were not identical and the difference between the two statements was not fairly and fully disclosed by the government's Bill of Particulars, as filed, and this defendant was entitled to have the said financial statement or statements, set forth in said Bill of Particulars in order that he might properly prepare his defense to the sixth count of the indictment.

(d) This defendant was entitled to have set out in a supplemental Bill of Particulars a copy of all written statement, representations or reports claimed to have been made by any of the defendants to the Corporation Commission of the State of Arizona and to Dunne's Insurance Reports, Louisville, Kentucky, which were referred to in Paragraph VIII of the Bill of Particulars as filed, and claimed by the government to contain false, fraudulent, misleading representations and promises, in order that this defendant might properly prepare his defense to the indictment.

(e) By the Court's overruling of said objections and denial of this defendant's motion for a supplemental and further Bill of Particulars, this defendant was forced

to proceed to trial without information concerning the particulars of the offense with which he was charged, necessary to the preparation of his defense. (162, 163, 164, 165)

SUBDIVISION NO. III OF ARGUMENT

ASSIGNMENT OF ERROR NO. X

The Court erred in admitting in evidence on behalf of the plaintiff United States of America, over the objection and exception of defendant appellant, government's Exhibit No. 27A, which abstracted to the issue involved is in full substance as follows:

> Minutes of special meeting of the board of directors of Union Reserve Life Insurance Company, March 30, 1933. Special meeting of the board of directors of the Union Reserve Life Insurance Company was held March 30, 1933 at the hour of twelve o'clock noon. Meeting was called to order and minutes of special meeting of December 31, 1932 were read and approved. State Securities Corporation has purchased the interest of Lorenzo M. Stohl in option agreement dated April 25, 1932 by M. E. Waddoups and Lorenzo M. Stohl for the purchase of 823 shares of capital stock of First National Life Insurance Company of Arizona. State Securities Corporation desires to endorse to M. E. Waddoups without recourse to apply on the payment of said 823 shares to Tomasita L. Lewis note and mortgage conveying to M. E. Waddoups and Ralph Murphy property at its face value of $27,889.86, and to accept in lieu thereof certain first mortgage securities belonging to State Securities Corporation and approved by

Arizona Corporation Commission for the use of Union Reserve Life Insurance Company as capital or surplus and to release that certain mortgage executed by Vinnie R. and Lorenzo M. Stohl in the amount of $7,000 covering property in Salt Lake City, Utah and to accept in lieu thereof from State Securities Corporation, first mortgage securities in equal amount of principal and interest approved by the Arizona Corporation Commission and to transfer to M. E. Waddoups without recourse the payment of the purchase price of stock, other notes held by the company and assigned therewith to M. E. Waddoups, mortgages securing the same on or before April 25, 1924, and to accept from said State Securities Corporation other first mortgage securities in amount equal to said mortgages so assigned when approved by the Arizona Corporation Commission. The officers of the company were directed to do and perform all things necessary under the terms of said suggestions and offer of State Securities Corporation. The offer of the State Securities Corporation to guarantee and pay all of the operating expenses of the Union Reserve Life Insurance Company, both in the office and field, including all compensation of officers, employees, agents, medical directors and any and all other expenses so that the company itself would not pay out any money in the conduct and procuring of business other than legal reserves, reinsurance premiums and death claims on a commission basis of ninety-five per cent of the first year and seven and one-half per cent yearly renewals as the premiums were paid. This offer was accepted and extension of loan of M. E. Waddoups for five

> years was approved. By motion, the membership of the board of directors of the company was increased to fifteen, and R. F. Marquis, George H. Cornes, H. S. Marquis, Wm. C. Fields, A. M. McLellan, George Dell, Jas. M. Meason, N. C. Bledsoe, W. E. Hawley and L. Jo Hall were appointed additional members of the board of directors. Meeting adjourned.

for the reason that the said exhibit was hearsay, and had not been properly identified; that as to defendant Canning they were immaterial, irrelevant and hearsay. The defendant Canning never having been an officer, director or stockholder in that company, said minutes could in no way bind defendant, and for the further reason that if the Court admitted the said Exhibit in evidence, it should have instructed the jury as requested by defendant appellant that it could have no effect as to defendant appellant, and should not have been considered as to him. (170, 171, 172, 173)

ASSIGNMENT OF ERROR NO. XI

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, government's Exhibit No. 27B which abstracted to the issue is in full substance as follows:

> Minutes of meeting of the executive committee of the Union Reserve Life Insurance Company, August 8, 1936. Meeting was held August 8, 1936 at the home office of the company. Meeting called to order by Mr. Cornes. All members present. Minutes

of previous meetings read and approved. Meeting was informed that State Securities Corporation had requested Union Reserve Life Insurance Company to execute back to the said State Securities Corporation the following: Promissory note in the sum of $17,500 executed by R. F. Marquis, Trustee, secured by mortgage covering farm units N. P. in the S½ of Q. Section 6, Township 1 South, Range W of the G. & S. R. B. & M., containing twenty-five acres more or less; Promissory note in the sum of $3,000 executed by George H. Cornes, Trustee, secured by mortgage covering North one-half of Farm Unit Q, Section 6, Township 10 South, Range 23 West of the G. & S. R. B. & M., containing five acres more or less; Promissory note in the sum of $12,000 executed by George H. Cornes, Trustee and secured by mortgage covering farm units M. and N., Section 7, Township 10 South, Range 23 West of the G. & S. R. B. & M. It was stated that it was the intention of the executive committee of State Securities Corporation to accept in lieu of said notes and mortgage to be assigned, notes and mortgages in the respective sums of $21,500, $4,500 and $17,500 for use by State Securities Corporation for Additional assets; that such notes and mortgages be accepted on condition that they be used for that purpose and that the trustee giving the same receive back the notes and mortgages in the sums of $17,500, $3,000 and $12,000 or their equivalent in cash when in the opinion of the executive committee same could be returned without impairing the assets of the corporation. It was stated that it would be highly beneficial to have the State Securities Corporation receive such

assets and transfer the same to this company as assets. By resolution the offer was accepted and the proper officers instructed to carry out the provisions of said proposition. Meeting adjourned.

for the same reason set forth in assignment of Error No. X; that as to defendant appellant said minutes were hearsay. No proper foundation had been laid and no showing that defendant appellant was present at said meeting or had any connection or interest therein, or knowledge of such. (173, 174, 175)

ASSIGNMENT OF ERROR NO. XII

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, government's Exhibit No. 27C which abstracted to the issue is in full substance as follows:

Minutes of annual meeting of stockholders of the Union Reserve Life Insurance Company, January 14, 1936. Annual meeting of stockholders of Union Reserve Life Insurance Company was held at offices of the company Tuesday, January 14, 1936. Secretary announced there was represented at the meeting 954 shares of the outstanding capital stock of the company. No shares were represented by proxy. A quorum was declared present. Minutes of previous meetings of the executive committee read and approved. Copy of resolution adopted by State Securities Corporation authorizing R. F. Marquis to vote all stock owned by the State Securities Corporation with full authority to act in the interest of the cor-

poration was read. On motion this resolution was approved and granted. Preliminary statement and report of the operations of the company for the year ending December 31, 1935, read and discussed. All claims and expenditures reviewed and fully discussed and noted that all real estate mortgages were in good condition. Other assets were not in default of interest. Items of policy loans was especially low and the amount saved out of each $1.00 of income compared favorably with other companies. Moved that the names of Allen Belluzzi be placed in nomination for membership upon the board of directors. Motion carried. Other matters were discussed and the meeting proceeded to the election of directors. By unanimous ballot the following directors were elected:

Dr. F. T. Hogeland
L. Jo Hall
Dr. N. C. Bledsoe
Dr. Jas. M. Meason
W. E. Hawley
H. S. Marquis
G. H. Cornes
R. F. Marquis
Wm. C. Fields
E. G. Hamilton
A. M. McLellan

All acts and expenditures made and performed by the officers and committee since last annual meeting of the stockholders was reviewed, endorsed, approved and adopted as the acts of the company. The business

of the company was discussed at length and the meeting adjourned.

for the same reasons set forth in assignment of error No. X. (175, 176, 177)

ASSIGNMENT OF ERROR NO. XXXIV

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 42 in evidence, which purports to be a carbon copy of a letter addressed to Mr. George H. Cornes, Hotel Utah, Salt Lake City, Utah, under date of November 22, 1934, for the reason that no proper foundation was laid for the introduction of such evidence, no showing was made of the loss or destruction of the original, no showing was made that the original had ever been mailed or received by the person to whom addressed, there was nothing in the letter to prove any allegation in the indictment or any count in the indictment, either of the formation of a scheme or device to defraud, the use of the mails to defraud or a conspiracy, and the said letter was incompetent, irrelevant and immaterial. (189, 190)

ASSIGNMENT OF ERROR NO. XXXV

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 43, which purports to be a carbon copy of a letter addressed to Mr. George H. Cornes, Newhouse Hotel, Salt Lake City, Utah, under date of December 7, 1934, for the same reasons that the Court

erred in admitting Government's Exhibit No. 42, set forth in Assignment of Error XXXIV above, and for the further reason that there was no sufficient identification of the purported carbon copy of the letter. (190)

ASSIGNMENT OF ERROR NO. XXXVI

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 44, being a purported carbon copy of a letter dated December 12, 1934 addressed to Mr. George H. Cornes, Hotel Utah, Salt Lake City, Utah, for the same reasons that the Court erred in admitting Government's Exhibit No. 42 set forth in Assignment of Error XXXIV above. (190)

ASSIGNMENT OF ERROR NO. XXXVII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's exhibit No. 46, being a purported carbon copy of a letter dated December 7, 1934, addressed to Mr. George H. Cornes, New House Hotel, Salt Lake City, Utah, for the same reasons that the Court erred in admitting Government's Exhibit No. 42 set forth in Assignment of Error XXXIV above. (190, 191)

ASSIGNMENT OF ERROR NO. XXXVIII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 47, being a purported carbon copy

of a letter dated November 19, 1934, addressed to Mr. George H. Cornes, Hotel Utah, Salt Lake City, Utah, for the same reasons that the Court erred in admitting Government's Exhibit No. 42 set forth in Assignment of Error XXXIV above, and for the further reason that no proper identification had been made of said letter. (191)

ASSIGNMENT OF ERROR NO. XXXIX

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 27-D, being purported minutes of a meeting of the Board of Directors of the Union Reserve Life Insurance Company, held May 15, 1933, which are unsigned, for the reason that no proper foundation had been laid for its introduction, that it is remote, unsigned and as to defendant appellant Canning irrelevant, incompetent and immaterial; not binding and pure hearsay, and for the further reason that the said purported minutes had not been properly, or at all, identified as being the minutes of any meeting regularly held. There was no showing that any of the defendants were present or that such a meeting had ever been held. (191, 192)

ASSIGNMENT OF ERROR NO. XL

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 27-E, purporting to be unsigned minutes of a meeting of the Board of Directors of Union Reserve Life Insurance Company, held March

29, 1937, for the reason that the said minutes had not been properly identified, they are unsigned, there was no showing that any such meeting had ever been held, and no showing that defendant appellant Canning ever attended any such meeting, and it was affirmatively shown that the defendant Canning was not an officer, stockholder or director of such company, and as to him the said minutes are irrelevant, incompetent, immaterial and pure hearsay, and there was no showing that George H. Cornes, or any of the other persons named therein, had ever attended such a meeting or that such a meeting had in fact ever been held. (192)

ASSIGNMENT OF ERROR NO. XLI

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 26-A, purporting to be unsigned minutes of a meeting of the stockholders of State Securities Corporation held February 9, 1937, for the reason that said minutes were not properly identified, they were not signed, there was no proof that any of the persons named therein ever attended such a meeting or that such a meeting had ever been held. There was no showing that defendant appellant Canning ever knew anything about any such purported meeting, and it was affirmatively shown that he was not a stockholder, officer or director of said company, and as to him the said minutes were pure hearsay, immaterial, irrelevant and incompetent. (193)

ASSIGNMENT OF ERROR NO. XLII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over

the objection and exception of the defendant appellant, Government's Exhibit No. 26-B, which purports to be unsigned minutes of a meeting of the stockholders of State Securities Corporation, held February 8, 1938, for the reason that there was no showing that defendant Canning attended such meeting, there was no showing that such a meeting was ever held, the minutes had not been properly identified and no foundation was laid for their introduction. The minutes purport to be of a meeting held in February, 1938, long after the transactions set forth in the indictment. There was no showing that George H. Cornes, or any of the other persons named in said minutes, ever attended such meeting, or that such meeting had ever been held. (193, 194)

ASSIGNMENT OF ERROR NO. XLIII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 26-C, being purported minutes of a meeting of the Executive Committee of State Securities Corporation, held September 5, 1936, unsigned, and no showing was made that a meeting of the Executive Committee was held on said date, nor as to who was present thereat, and no attempt to show that the defendant appellant Canning attended such meeting or knew anything concerning the same, and it was affirmatively shown that he was not a member of said Executive Committee, there was no showing as to what had become of the original letter setting forth such minutes, if there had been one, and no proper foundation laid for its introduction, nor properly identified and as to defendant appellant Earl Canning pure hearsay. (194)

ASSIGNMENT OF ERROR NO. XLIV

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 45, being an envelope addressed to Mrs. W. H. Etz, Benson, Arizona, return address, State Securities Corporation, 210 Luhrs Tower, Phoenix, Arizona, bearing cancellation stamp, Phoenix, Arizona, April 4, 1935, 8:30 P. M., purporting to contain a letter signed by R. F. Marquis, and the annual report or financial statement of Union Reserve Life Insurance Company, of December 31, 1934, for the reason that as to defendant Canning the letter is hearsay, it is not binding on him, is irrelevant, incompetent and immaterial, is not within the issues described in the indictment or in the bill of particulars. (194, 195)

ASSIGNMENT OF ERROR NO. XLV

The Court erred in permitting the witness Helen G. Etz to testify to purported conversations held in August or September, 1937, with E. G. Hamilton and R. F. Marquis, over the objection of defendant Earl Canning that as to him the said testimony was purely hearsay, there was no showing that defendant appellant Canning was present or knew anything of the conversation, and no proper foundation had been laid. (195)

ASSIGNMENT OF ERROR NO. XLVI

The Court erred in permitting the witness Helen G. Etz to testify as to a purported conversation between E. G. Hamilton, Mr. Etz' father and mother and the witness, on December 24, 1937, after the time of

the charge in the indictment, over the objection of the defendant appellant that it was subsequent to the date of the offense alleged in the indictment, it was not mentioned in the indictment or in the bill of particulars. There was no showing that he was present or knew of the conversation, and as to him it was pure hearsay. (195, 196)

ASSIGNMENT OF ERROR NO. XLVII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 50, being a business card containing on its face in figures and printing, "3-5382, E. G. Hamilton, Vice President, Union Reserve Life Insurance Company, Phoenix, Arizona", for the reason that it was too remote, subsequent to the dates mentioned in the indictment, having no bearing on any charge therein set forth, and as to defendant appellant, hearsay, irrelevant, incompetent and immaterial. (196)

ASSIGNMENT OF ERROR NO. XLVIII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 35, being a letter dated September 27, 1937, addressed to Mr. W. H. and/or Mrs. Helen G. Etz, Yarnell, Arizona, with its enclosures and envelope, for the reason that no foundation was laid for its introduction as against defendant appellant Canning, and as to him it was pure hearsay, irrelevant, immaterial, and incompetent, because there has been no

showing that he had any connection with it or any knowledge of the transaction. (196, 197)

ASSIGNMENT OF ERROR NO. XLIX

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 51, being a receipt dated at Yarnell, Arizona, September 16, 1937, signed by E. G. Hamilton, for the reason that as to defendant appellant Canning no proper foundation had been laid for its introduction and it is hearsay, immaterial, irrelevant and incompetent. (197)

ASSIGNMENT OF ERROR NO. L

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 52 and Government's Exhibit No. 53, consisting of a portion of the records of the First National Bank of Arizona at Phoenix, as set forth in the bill of exceptions, for the same reasons that the Court erred in admitting Government's Exhibit No. 12, set forth in Assignment of Error VIII, and for the further reason that no proper foundation had been laid, no proper identification of the exhibit was made, that as to defendant appellant they are pure hearsay, incompetent, irrelevant and immaterial. (197)

ASSIGNMENT OF ERROR NO. LI.

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the

objection and exception of defendant appellant, Government's Exhibit No. 48-A and Government's Exhibit No. 49-A, being purported carbon copies of letters addressed to Insurance Index, concerning the financial report and publication of information relative to Union Reserve Life Insurance Company, for the same reasons the Court erred in admitting Government's Exhibit No. 40, set forth in Assignment of Error XXIX. (198)

ASSIGNMENT OF ERROR NO. LII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 54, consisting of two documents, being a letter written to H. F. Link under date of November 7, 1934, together with the second sheet enclosed therewith, addressed to H. F. Link, dated November 5, 1934, and setting forth the allocation of 100 shares of capital stock of State Securities Corporation to the said H. F. Link, for the reason that no foundation was laid for their introduction, that it is too remote, that it is not within the issues as made in the indictment or supplemented by the bill of particulars, and as to defendant appellant Earl Canning it is pure hearsay, immaterial, irrelevant and incompetent. (198)

ASSIGNMENT OF ERROR NO. LIV

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 34, consisting of a letter dated July 20, 1937, addressed to Mr. Gerald Palmer, Cross

Triangle Ranch, with its accompanying envelope and proxy receipt, for the reasons that the Court erred in admitting Government's Exhibit No. 40, set forth in Assignment of Error XXIX, and for the further reason that the said exhibit is hearsay as to defendant Canning, irrelevant, incompetent and immaterial. (200)

ASSIGNMENT OF ERROR NO. LV

The Court erred in permitting the Government's witness, Bill Etz, to testify concerning a purported conversation held December 24, 1937, at his home at Yarnell, at which his wife, mother and father and Helen G. Etz were present, for the same reason that the Court erred in permitting Mrs. Etz to testify concerning the same transaction set forth in Assignment of Error XLVIII above. (200)

ASSIGNMENT OF ERROR NO. LVI

The Court erred in admitting in evidence on behalf of the plaintiff, United State of America, over the objection and exception of defendant appellant, Government's Exhibit No. 33, consisting of a stamped envelope, addressed to May E. Bonar, with a printed annual report of Union Reserve Life Insurance Company as of December 31, 1936, for the reason that as to defendant appellant Canning no proper foundation had been laid for its introduction, it had not been properly identified, it was irrelevant, incompetent, immaterial and hearsay. (200, 201)

ASSIGNMENT OF ERROR NO. LVII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the

objection and exception of defendant appellant, Government's Exhibit No. 41, being a letter dated August 9, 1933, addressed to Mrs. May E. Bonar, with accompanying envelope, for the same reasons that the Court erred in admitting Government's Exhibit No. 40, set forth in Assignment of Error XXIX above, and for the further reason that the letter was too remote, the stock was purchased three years before the date of the letter, and there is no charge or allegation concerning the mailing of the letter in the furtherance of any scheme to defraud, that it is immaterial, incompetent and irrelevant, and had not been properly identified and no proper foundation had been laid. (201)

ASSIGNMENT OF ERROR NO. LVIII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 56, which is a letter dated February 1, 1932, and a balance sheet as of December 31, 1931, for the same reasons that the Court erred in admitting Government's Exhibit No. 40, set forth in Assignment of Error XXIX above, and for the further reason that Government's Exhibit No. 56 is dated December, 1931 and February, 1932, and is too remote, irrelevant, incompetent, and immaterial and outside the issues of this case, and was not properly identified and no foundation was laid for its introduction, and as to defendant appellant it is hearsay. (201, 202)

ASSIGNMENT OF ERROR NO. LXI

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the

objection and exception of defendant appellant, Government's Exhibit No. 32, being a letter dated June 22, 1937, accompanied by an envelope addressed to Mr. H. E. Simmons, Cave Creek, Arizona, and containing a copy of Dunne's Insurance Report on Union Reserve Life Insurance Company, Phoenix, Arizona, and a copy of the annual report of Union Reserve Life Insurance Company as of December 31, 1936, for the reason that no proper foundation was laid for the introduction of such exhibit as to this defendant appellant, and for the same reasons that the Court erred in admitting Government's Exhibit No. 40, set forth in Assignment of Error XXIX above. (203, 204)

ASSIGNMENT OF ERROR NO. LXII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 62, which purports to be a carbon copy of an undated letter addressed to Mrs. May E. Bonar, 227 West Elm Street, Compton, California, for the reason that no proper foundation was laid for its introduction, that it was immaterial, and incompetent and hearsay as to defendant Canning, and for the reason that the Court erred in admitting Government's Exhibit No. 40, set forth in Assignment of Error XXIX above. (204)

ASSIGNMENT OF ERROR NO. LXIII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Gov-

ernment's Exhibits Nos. 26-D, 26-E, 26-F, 26-G, 26-H, 26-I, 26-J, 26-K, 26-L, 26-M, 26-N, 26-O, 26-P, 26-Q, 26-R, 26-S, 26-T, 26-U, 26-V, 26-W, 26-X and 26-Y, consisting of purported minutes of meetings, which are set forth in the bill of exceptions, for the reason that as to defendant Canning, no proper foundation had been laid for their introduction, no proof was offered that the purported minutes correctly relate what occurred at any of the purported meetings, and that as to defendant Canning, he not being an officer, director or stockholder of any of the companies, the said minutes are irrelevant, incompetent, immaterial and pure hearsay. (204,205)

ASSIGNMENT OF ERROR NO. LXV

The Court erred in denying the motion of defendant appellant made at the close of the government's case, to strike from the evidence all of the parts of the Government's Exhibit No. 26 and No. 27 for identification, which had been marked and put in evidence, they being the purported minutes of State Securities Corporation and Union Reserve Life Insurance Company, respectively, for the reason that as to defendant Canning they are hearsay and no foundation was laid for their introduction; they were not properly identified; there was no showing that the minutes were kept in the regular course of business of the two companies, but on the contrary the evidence shows that they were written up at the end of the year. There was no showing that they had ever been communicated to defendant appellant Canning or that he had any knowledge thereof. (207)

ASSIGNMENT OF ERROR NO. LXXI

The Court erred in admitting in evidence, on behalf of the plaintiff, United States of America, over the

objection and exception of defendant appellant, Government's Exhibit No. 68, which is in full substance as follows:

Government's Exhibit No. 68

March 26, 1937

Mr. G. L. Reay
R. F. D.
Winkleman, Arizona

Dear Mr. Reay:

I am in receipt of letter from J. Elmer Johnson stating that he had requested you to call at this office in regard to mortgage held by this company on ninety (90) acres of land owned by Mr. Johnson and yourself.

We have been expecting you, but up to this date we have not had the pleasure of your visit. It is necessary that some adjustment of this past-due matter be made; hence I am asking that upon receipt of this letter that you give personal attention to the item.

I am enclosing stamped, addressed envelope for your convenience in advising when you can meet me at our office.

Very truly yours,

R. F. MARQUIS
Secretary-Treasurer

RFM:MD

for the reason that no proper foundation had been laid for its introduction as against the defendant appellant

Canning, as to him it is pure hearsay, irrelevant, incompetent and immaterial. (211)

ASSIGNMENT OF ERROR NO. LXXIII

The Court erred in denying the motion of defendant appellant, made at the close of all of the evidence, to strike all testimony given in the case of events claimed to have transpired subsequent to January 1, 1938, for the reason that, under Count Six, the conspiracy count of the indictment, the alleged conspiracy was alleged to have ended on January 1, 1938, and any events subsequent to such date would be wholly irrelevant, incompetent and immaterial and pure hearsay, and without the bounds of the indictment or the bill of particulars as it affects Count Six, the conspiracy charge, (213)

SUBDIVISION NO. IV OF ARGUMENT

ASSIGNMENT OF ERROR NO. III

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 5, which abstracted to the issue involved, in full substance is as follows:

> A portion of the records of the Arizona Corporation Commission containing an application of State Securities Company for authority to sell five thousand shares of the capital stock of the corporation at Twenty Dollars per share. Said Exhibit, having in it a copy of certificate of stock, balance sheet of September 30, 1930, bal-

ance sheet of April 1, 1930, balance sheet of July 31, 1930, balance sheet of June 30, 1930, balance sheet of May 31, 1930, balance sheet of April 30, 1930, balance sheet of March 31, 1930, balance sheet of March 3, 1930, balance sheet of February 10, 1930, together with an agreement to purchase stock and the application setting out in detail the business of the company and the ownership of the corporation as of the date of filing, together with an approval of the application and an authorization of the issuance of the permit to sell five thousand shares of the stock.

for the reason that no proper foundation had been laid for the introduction of such Exhibit and for the reason that the Exhibit contains purported statements and correspondence which had not been identified as being made by the persons who purport to have signed and they were irrelevant, incompetent and pure hearsay as to defendant Canning. (165, 166)

ASSIGNMENT OF ERROR NO IV

The Court erred in denying the motion of defendant Canning to strike all the papers in Government's Exhibit No. 5, except the order showing the action of the Corporation Commission, for the reason that all other paper in said Government's Exhibit No. 5 were not properly identified, no proper foundation had been laid for their introduction, and as to defendant Canning they are pure hearsay. (166)

ASSIGNMENT OF ERROR NO. V

The Court erred in permitting the witness Willis Ethel to testify that he did not find in the records

of the Corporation Commission of Arizona any record of any permit having been issued to Raymond F. Marquis, George H. Cornes, Harry S. Marquis or Edgar G. Hamilton for the sale of stock in the State Securities Corporation over the objection and exception of defendant appellant, for the reason that such evidence was irrelevant, incompetent, immaterial and not the best evidence; that the records of the Corporation Commission were the best evidence and that the evidence sought as to defendant Earl Canning was pure hearsay, and that the same was highly prejudicial because under the law no permit was required in behalf of Raymond F. Marquis, George H. Cornes, Harry S. Marquis or Edgar G. Hamilton to sell their own stock. (166, 167)

ASSIGNMENT OF ERROR NO. VI

The Court erred in permitting the witness Willis Ethel to testify that he had made a search of the records of the Corporation Commission for financial statements, or annual reports by the State Securities Corporation and found none for the year 1933 and subsequent years, over the objection of defendant appellant, for the reason that such evidence is irrelevant, incompetent and immaterial and has no bearing upon the issues of this case whether financial statements were filed or were not filed, and can have no bearing on the indictment and any charge in the indictment, and not covered in the indictment or Bill of Particulars, and for the reason that such testimony was hearsay, not the best evidence and should be limited to the defendants to whom it is applicable. (167)

ASSIGNMENT OF ERROR NO. VIII

The Court erred in admitting in evidence Government's Exhibit No. 12, the purported cash journal of the Union Reserve Life Insurance Company for the year 1936, over the objection of defendant appellant, for the reason it had not been properly identified; that as to him there was no showing that he had anything to do with the bookkeeping system of the company and no showing that the company was the agent of defendant appellant; that as to him it was pure hearsay; that no proper foundation had been laid; that there was no showing that the entries appearing in the Exhibit were either original entries or first permanent entries of the transaction, which such Exhibit purports to portray; that there was no attempt to produce any of the persons who made original entries or persons having konwledge of the facts and said entries are not corroborated by any persons having personal knowledge of the facts, and no showing that such persons are dead, insane or beyond the reach of process; that said Exhibit was not admissible under Section 695, Title 28, USCA, for the reason that said act unconstitutionally attempts to shift the burden of proof from the government to the defendant; that said act is unconstitutional, null and void in that it violates the sixth amendment to the Constitution of the United States in that it deprives the defendant of the right to be confronted with the witnesses against him in that no opportunity has been offered to cross-examine the persons who are familiar with the accounts and transactions set forth in such Exhibit, or who made the original entries therein, so that the truth or accuracy of the statements in said Exhibit might be determined and, therefore, such document is pure hear-

say as to defendant appellant, and upon the further reason that under Section 695, Title 28, USCA no showing had been made that such Exhibit was made in the regular course of the business of the company, and no showing that it was the regular course of such business to make entries in such Exhibit at the time of the act, transaction, occurrence or event which such entries attempt to portray, or within a reasonable time after such act, transaction, occurrence or event took place, and the said Exhibit is not the best evidence and is hearsay. No materiality has been shown and it is irrelevant, incompetent and immaterial, being a book with a multitude of entries not shown to be in any way material to the issues of the case. (168, 169).

ASSIGNMENT OF ERROR NO. XIII

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, government's Exhibit No. 8, which is the journal of the Union Reserve Life Insurance Company from January 2, 1937, up to and including March 4, 1938, showing receipts and disbursements in detail of Union Reserve Life Insurance Company, for the reasons set forth as to the admissibility of government's Exhibit No. 12, assignment of error No. VIII above, and for the further reason that no proper foundation had been laid; that it was hearsay, irrelevant, incompetent and immaterial; that there was no showing of any materiality of anything connected in the book under the indictment or Bill of Particulars, and that the whole book was offered *without* specifying anything in it and it had no bear-

ing on the case without a statement or showing as to its materiality or relevancy. (177, 178).

ASSIGNMENT OF ERROR NO XIV

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 28 being a bundle of receipts for the payment of premiums, covering a portion of the year 1937, showing the amount of premium, when due, when received and by whom paid, for the reasons the said Exhibit had not been properly identified, no materiality was shown, and on the face of the Exhibit and items in the Exhibit it does not tend to prove any charge in the indictment, is hearsay, irrelevant, incompetent and immaterial as to defendant appellant. (178)

ASSIGNMENT OF ERROR NO. XV

The Court erred in admitting in evidence on behalf of the plaintiff United States of America, over the objection and exception of the defendant appellant, Government's Exhibit No. 11 which is the journal of Union Reserve Life Insurance Company from May 6, 1932, to December 31, 1934, containing the record of cash receipts and disbursements of said Union Reserve Life Insurance Company during said period, for the same reasons set forth in the objections to Government's Exhibit No. 12, assignment of error No. VIII above. (178, 179)

ASSIGNMENT OF ERROR NO. XVI

The Court erred in admitting in evidence on behalf of the plaintiff United States of America, over

the objection and exception of defendant appellant, Government's Exhibit No. 10, the general cash journal beginning January 2, 1935, and ending December 31, 1935, showing the general cash receipts and disbursements of the Union Reserve Life Insurance Company for the year 1935, for the reasons assigned in the objections to Exhibit No. 12, assignment of error No. VIII above, and for the further reason that it appeared from the testimony of the witness King Wilson that this book had been kept by him and the Court had permitted the said witness to leave the jurisdiction of the Court and had thus deprived the defendant of his constitutional right under amendment sixth to the Constitution of the United States to be confronted with the witness against him, and the right to cross-examine that witness on documents introduced in evidence, and that it shifted the burden of proof from the government to the defendant. (179).

ASSIGNMENT OF ERROR NO. XVIII

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 9 for the same reasons set forth in the objection to Exhibit No. 12, assignment of error No. VIII, and for the further reason that the book purports on its face to have been started in 1930, long before there was any record that the defendants, or any of them, were connected in any manner with the Union Reserve Life Insurance Company, or its predecessor, and no materiality was shown and the book contained irrelevant, incompetent and immaterial matters and there was no showing that the book was kept in

the regular course of business, but on the contrary, it was shown that the entries were not made during the ordinary course of business but at a later date at the end of the year, and for the further reason that the witness King Wilson had been excused by the Court over the objection of defendant appellant from further attendance and thereby defendant appellant was deprived of his right of cross-examination. (180, 181)

ASSIGNMENT OF ERROR NO. XIX

The Court erred in admitting in evidence on behalf of the plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 7, which consists of annual reports of the Union Reserve Life Insurance Company to the Commissioner of Insurance of the State of Arizona for the years 1933, 1934, 1935 and 1936, containing the name of the company, where and on what date incorporated, the date of the commencement of business, the home office address, the names of the officers and directors, a statement of the capital stock and ledger assets and liabilities and other funds, amount paid for business, business in the State of Arizona for the past year and a profit and loss statement for the year together with a summary of the mortgages owned by the company for each year for which said statement was filed, all four books being marked with one Exhibit number and all containing identical information for the year for which it was filed, for the reason that the said reports were incompetent, irrelevant and immaterial; no foundation had been laid for their introduction; they were hearsay as to defendant appellant and no materiality had been shown. (181)

ASSIGNMENT OF ERROR NO XX

The Court erred in admitting in evidence on behalf of the plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 29 which consists of six bound volumes of duplicate check vouchers showing checks issued by the Union Reserve Life Insurance Company, the date issued, in whose favor drawn, to what bank directed, and the account for which said checks were drawn, being checks numbered 2583 to 3600, both inclusive, for the reason that no materiality was shown; as to defendant Earl Canning they are hearsay, immaterial, irrelevant and incompetent and for the further reasons set forth in assignment of error No. VIII as to Government's Exhibit No. 12 (182)

ASSIGNMENT OF ERROR NO. XXI

The Court erred in admitting in evidence on behalf of the plaintiff United State of America, over the objection and exception of defendant appellant, Government's Exhibit No. 30, being six volumes of check stubs, a part of the records of the Union Reserve Life Insurance Company covering the period from August 8, 1934, to June 5, 1935, showing the record of all of the checks issued by the Union Reserve Life Insurance Company during that period of time, for the reason that no materiality was shown; as to defendant Canning they are hearsay, incompetent, irrelevant and immaterial (182).

ASSIGNMENT OF ERROR NO. XXII

The Court erred in admitting in evidence on behalf of the plaintiff United States of America, over the

objection and exception of defendant appellant, Government's Exhibit No. 14, being the general ledger or agent's ledger of State Securities Corporation for the year 1933, showing receipts and disbursements of said corporation for that period of time, together with agent's commissions and bond transfers, for the reason that no proper foundation had been laid; it is hearsay, immaterial and incompetent and there has been no showing as to the correctness of it, and no showing that the witness identifying it, Ora T. Hill, knew anything about the book, except the few entries she had made herself. (183).

ASSIGNMENT OF ERROR NO. XXIII

The Court erred in admitting on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 17, being the cash book and journal of the investment department of the State Securities Corporation for the years 1931 to 1933, showing cash receipts and disbursements of investment department of said corporation, the legal reserve set up, notes and bonds owned, general ledger assets, a record of bonds sold on installments, commissions paid and record of fully paid up bonds, for the reason that no proper foundation had been laid for its introduction, no materiality was pointed out; it had not been properly identified; it was immaterial, irrelevant and incompetent and hearsay and no showing that it was kept in the ordinary course of business, but on the contrary the witness Ora T. Hill, through whom the government sought to identify the book for its introduction in evidence, testified that she could not identify the Government's Exhibit No. 17; that she never worked on that book; that she was not in

the office when any of the entries were made in that book, and not employed in the office at the time the book was kept, and that she did not know that the entries were made in the ordinary course of business. (183, 184)

ASSIGNMENT OF ERROR NO. XXIV

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 15, being a purported cash book and journal of the insurance department of State Securities Corporation for the year 1933, beginning April 1, 1933, and ending December 31, 1933, showing receipts and disbursements during said period, for the reason that no materiality had been shown in said book, or in any of the entries thereof. The said book contains voluminous entries, the materiality of none of which is shown and as to defendant appellant Canning, the said book is hearsay, immaterial, irrelevant and incompetent. (184)

ASSIGNMENT OF ERROR NO. XXV

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 19 which consists of ten books of stock certificate stubs and used and unused certificates of stock of State Securities Corporation, being all of the stock certificate books owned and used by said State Securities Corporation and showing the number of shares, to whom and when issued and the cancellation of all shares cancelled and re-issued, together with all other information relative to stock certificates, for the reason that no

proper foundation was laid for their introduction, no materiality was shown and as to defendant, Canning, they were hearsay, immaterial, irrelevant and incompetent. (184, 185)

ASSIGNMENT OF ERROR NO. XXVI

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 22 consisting of forty receipt books, showing carbon copies of receipts issued by State Securities Corporation for money received during all of the period of the life of said corporation, for the same reasons that the Court erred in admitting Exhibit No. 12, assignment of error No. VIII. (185)

ASSIGNMENT OF ERROR NO. XXVII

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 24, being twenty-three check books of check vouchers of Union Reserve Life Insurance Company, showing the dates of checks, to whom drawn, the amount and for what purposes, for the same reasons the Court erred in admitting government's Exhibit No. 12, set forth in assignment of error No. VIII, and for the further reason that no materiality was shown and as to the defendant Earl Canning the said check books are hearsay, incompetent, immaterial and irrelevant. (185, 186)

ASSIGNMENT OF ERROR NO. XXVIII

The Court erred in denying the motion of defendant appellant to strike Exhibit No. 22 from the evidence for the reason that the said receipt books were not properly identified and were pure hearsay, and there was nothing before the Court to show that they were kept in the ordinary course of business, and there was no identification of any writing, the witness having testified that many of the books were not kept while she was in the employ of the State Securities Corporation, and she had nothing to do with them until 1937 and she had no knowledge of the making of those receipt books at the time, nor any knowledge of the ordinary course of keeping books. (186)

ASSIGNMENT OF ERROR NO. XXIX

The Court erred in admitting in evidence on behalf of United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 40, which is a carbon copy of a letter dated June 27, 1932, to Mr. J. Owen Ambler, Kensington Gardens, 1002 North Mariposa, Los Angeles, California, and which is set forth in full in the Bill of Exceptions, for the reason that it was not the best evidence. There was no showing as to what became of the original letter, or whether or not it was lost. No foundation had been laid for its introduction; it was pure hearsay; it was not covered by the indictment or the Bill of Particulars, and there was no showing that defendant appellant had any knowledge of the writing of the letter, or that he had anything to do with it, and as to him it is pure hearsay, irrelevant, incompetent and immaterial. (187)

ASSIGNMENT OF ERROR NO. XXX

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of defendant appellant, of that part of Exhibit No. 13 for identification consisting of the account under the name of L. Jo Hall, Lowell, Arizona, consisting of two pages beginning with the entry dated June 29, 1930, and the last entry being dated January 17, 1936, for the reason that no proper foundation had been laid for the introduction of the Exhibit; it is hearsay; it is not shown to have been kept in the ordinary course of business and is incompetent, immaterial and irrelevant for any purpose in the case. (187)

ASSIGNMENT OF ERROR NO XXXI

The Court erred in admitting in evidence on behalf of United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 18, being the purported cash book of Marquis, Cornes & Marquis, showing transactions, cash received, disbursements, agent's commissions, etc., for the reasons the Court erred in admitting government's Exhibit No. 12 set forth in assignment of error No. VIII above, and for the further reason that it is incompetent, irrelevant and immaterial, purporting to be a book kept from 1929 to 1932 inclusive, far beyond the period of limitation; no showing that it is complete and is not claimed as a book kept in the ordinary course of business in either of the corporations mentioned in the indictment. It was not properly identified and no foundation laid for its introduction. (188)

ASSIGNMENT OF ERROR NO. XXXII

The Court erred in admitting in evidence on behalf of the plaintiff United States of America, over the objection and exception of the defendant appellant, Government's Exhibit No. 21 consisting of seventy-eight packages and envelopes, being two pasteboard boxes containing cancelled checks and bank statements of State Securities Corporation, for the same reasons the Court erred in admitting Government's Exhibit No. 12 set forth in assignment of error No. VIII, and for the further reason that there was no evidence that the Exhibit contained all of like records of the company at that time. (188, 189)

ASSIGNMENT OF ERROR NO. XXXIII

The Court erred in admitting in evidence on behalf of plaintiff United States of America, over the objection and exception of the defendant appellant, Government's Exhibit No. 23, being one pasteboard box of check stubs of State Securities Corporation, for the same reasons the Court erred in admitting Government's Exhibit No. 12, set forth in assignment of error No. VIII. (189)

ASSIGNMENT OF ERROR NO. LIX

The Court erred in admitting in evidence on behalf of the plaintiff, United States of America, over objection and exception of the defendant appellant, Government's Exhibit No. 57 and Government's Exhibit No. 58, being, respectively, a certificate for 600 shares of the capital stock of State Securities Corporation, issued to L. Jo Hall, June 29, 1930, and check dated August 18,

1930, drawn to the order of State Securities Corporation, signed by L. Jo Hall, in the sum of $6,000, for the reason that as to defendant Canning the said exhibits, and each of them, are irrelevant, incompetent and immaterial, hearsay, no proper foundation laid, and not set forth in the indictment or in the bill of particulars. (202)

ASSIGNMENT OF ERROR NO. LXVII.

The Court erred in denying the motion of defendant appellant, made at the close of Government's case, to strike from the evidence Government's Exhibits numbered 8, 9, 10, 11, 12, 14, 15, 16, 17, and 18, severally and separately, they being the books and records of the companies, for the reasons that no proper foundation had been laid for their introduction; there was no showing that this defendant had any charge of the bookkeeping system, as to him they are hearsay, incompetent, irrelevant and immaterial. (208)

SUBDIVISION NO. VI OF ARGUMENT

ASSIGNMENT OF ERROR NO. LXIX

The Court erred in permitting the witness E. P. Hair to testify in rebuttal, over the objection and exception of the defendant appellant, concerning entries in the books of Marquis, Cornes and Marquis, and in the cash book of Union Reserve Life Insurance Company, concerning business transactions purportedly had with J. Elmer Johnson, for the reason that said testimony was not proper rebuttal, no question having been asked in the Government's case concerning any business transactions with the said J. Elmer Johnson, such transac-

tions not having been referred to in the indictment or in the bill of particulars, such testimony was not offered for impeachment purposes of any witness, no foundation had been laid for its introduction and it was highly prejudicial. (209)

ASSIGNMENT OF ERROR NO. LXX.

The Court erred in admitting evidence on behalf of the plaintiff, United States of America, over the objection and exception of defendant appellant, Government's Exhibit No. 67, which purports to be a balance sheet of State Securities Corporation as of January 31, 1931, prepared by Government's witness Hair for the reason that said exhibit was not proper rebuttal evidence, does not purport to be accurate and correct, and is irrelevant, incompetent and immaterial and pure hearsay. (209, 210)

ASSIGNMENT OF ERROR NO. LXXI.

The Court erred in admitting in evidence, on behalf of the plaintiff, United State of America, over the objection and exception of defendant appellant, Government's Exhibit No. 68, which is in full substance as follows:

GOVERNMENT'S EXHIBIT NO. 68

March 26, 1937

Mr. G. L. Reay
R. F. D.
Winkleman, Arizona

Dear Mr. Reay:

I am in receipt of letter from J. Elmer John-

son stating that he had requested you to call at this office in regard to mortgage held by this company on ninety (90) acres of land owned by Mr. Johnson and yourself.

We have been expecting you, but up to this date we have not had the pleasure of your visit. It is necessary that some adjustment of this past-due matter be made; hence I am asking that upon receipt of this letter that you give personal attention to the item.

I am enclosing a stamped, addressed envelope for you convenience in advising when you can meet me at our office.

Very truly yours,

R. F. MARQUIS
Secretary-Treasurer

RFM:MD

for the reason that no proper foundation had been laid for its introduction as against the defendant appellant Canning, as to him it is pure hearsay, irrelevant, incompetent and immaterial. (210, 211)

SUBDIVISION NO. VII OF ARGUMENT

ASSIGNMENT OF ERROR NO. LXIV.

The Court erred in denying the motion of defendant appellant made at the close of the government's case that the Court direct the jury in said cause to return a verdict for the defendant appellant finding him not guilty on each and every count of the indictment, including the sixth count, upon the ground and for the reason that

there was no substantial evidence to sustain the charges made in the several counts of the indictment, and particularly the sixth count of the indictment, in that,

(a) There was no substantial evidence to show that the defendant appellant devised any scheme to defraud, or ever took any part in any scheme to defraud, or to obtain money and property by means of false and fraudulent pretenses, representations and promises as charged in the indictment.

(b) There was no substantial evidence to show that defendant appellant ever conspired, combined, confederated, or agreed with any of the other defendants, or any other person, to commit any of the divers offenses charged against defendants in the divers counts of the indictment, or to use the Post Office establishment of the United States in the commission of any of the offenses or ever performed any act of the offenses, or ever performed any act to effect the object of said unlawful and felonious conspiracy.

(c) It was affirmatively shown in the government's case that the defendant appellant was not an officer, director or stockholder of any of said companies; that he took no part in and had nothing to do with the management, control and policies of any of the other defendants, or any of said companies.

(d) His only connection was that he did occasional auditing work and bookkeeping work for the said companies, and that he was paid therefor only the usual and customary charge for his time and had not been paid all that was owed to him on that basis.

(e) There was no evidence that defendant appellant ever assisted or attempted to assist any of the defendants in the sale of any stock, bonds or other securities, and it was conclusively shown that he did not profit by any such sale of bonds or other securities.

(f) There was no evidence that any statement made by defendant appellant was made fraudulently or with any intent to defraud, but on the contrary it was shown by the Government's witnesses that the statements, as made, truly reflected the figures in the books which they purported to reflect.

(g) There was no evidence of any criminal intent on the part of the defendant appellant Canning. (205, 206, 207)

ASSIGNMENT OF ERROR NO. LXXII.

The Court erred in denying the motion of defendant appellant made at the close of all the evidence that the Court direct the jury in said cause to return a verdict for defendant appellant, finding him not guilty as to each and all of the counts of the indictment, separately and severally, including Count Six, upon the ground and for the reason that there was no substantial evidence to sustain the charge made in any count of the indictment, including Count Six, separately and severally, in that:

(a) There was no substantial evidence to show that the defendant appellant devised or intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises as charged therein, nor that

he aided and abetted in any such scheme or artifice to defraud, or conspired with any of the other defendants, or with any other person whomsoever to obtain money and property by means of false and fraudulent pretenses, representations and promises, and to use the mails in furtherance thereof, or otherwise;

(b) There was no substantial evidence to show that defendant appellant ever made or aided or assisted in making any representations and promises in the sale of stock and bonds, true or false, or otherwise;

(c) There was no substantial evidence of any intent on the part of defendant appellant to defraud or to obtain money and property by means of false and fraudulent pretenses, representations and promises, or otherwise;

(d) On the contrary, the evidence shows that the defendant appellant had nothing to do with the control, management or policy of any of the companies involved, or of any of the other defendants; that he was never an officer, stockholder or director of any said companies, and did not participate therein, nor profit therefrom or thereby, except that he did occasional auditing and bookkeeping work for said companies for which he charged on a time basis his regular rates, and that he had not been paid all he had earned;

(e) There was no substantial evidence to show that the defendant appellant ever had any knowledge of or aided or assisted in the making of any false and fraudulent representations by any person whomsoever;

(f) There was no substantial evidence to show that the defendant appellant ever conspired or intended to conspire with either of the other defendants, or with any other person, to commit any offense or perform any acts in aid of any scheme or device to defraud or to obtain money and property by means of false and fraudulent pretenses, representations and promises. (211, 212, 213)

SUBDIVISION NO. VIII. OF ARGUMENT

ASSIGNMENT OF ERROR NO. LXXIV

The Court erred in overruling the exception and objection of defendant appellant to that portion of the instruction given by the Court to the jury as follows:

> "It is the law that when the defendants, or either of them, incorporate statements or representations of others in his or their literature or printed matter, he or they adopt them as their own, and in such work they are responsible for such statements and representations,"

for the reason that said instruction is confusing and misleading and incorrectly states the law, without the additional qualification, "that he is responsible if he has knowledge of their falsity". (213, 214)

ASSIGNMENT OF ERROR LXXV.

The Court erred in instructing the jury as follows:

> "The defendants in this case, gentlemen, are entitled to the individual opinion of each juror, and no juror should vote for the conviction of a defend-

ant as long as he entertains a reasonable doubt of the defendant's guilt, notwithstanding the opinions of others of the jury. You note, gentlemen, that a juror qualifies himself to make up his judgment only after he has given fair, full, impartial and candid consideration of the facts in evidence. This means that he should bring to bear upon the question, not only his power of mind, but that he should freely consider the views of his fellows. A criminal case is not submitted to jurors as individuals. No one juror is legally competent to decide it adversely to the defendant on trial. It is submitted to the jury as a deliberative body, whose judgments are worthy only when they are produced by the contributions of a right solution of each member. Each juror, therefor, should not only attempt to think out a solution for himself, but he should allow his fellows to assist his thinking. Even though having arrived at an opinion, he should consider with an open mind the diverse opinions of others. He should test his conclusions by the views of his fellows, but also to listen to the advice of others. In theory, at least, gentlemen, a hung jury is seldom possible if every juror give the same degree of fair and candid and coolheaded consideration to the case. That is so, because the processes of reasoning and common sense are fairly uniform with men of average ability and reasonableness; and to such who are only competent for jury service, facts speak with much the same force. It is seen that the doctrine of reasonable doubt, therefore, is not a bug-a-boo, not a convenient excuse to avoid doing something unpleasant; not a cover for stubbornness, but simply a call

to candid and fairminded man to be careful and not decide until they are convinced of the guilt of the individual, as charged, to a moral certainty. When you are convinced to a moral certainty, not an absolute certainty, but to a moral certainty, you are convinced beyond a reasonable doubt. The terms are convertible.

"As jurors, you apply to the work before you the same method of reasoning and the same standard of comparison of the weight of facts clearly established in the evidence as you would apply under equivalent conditions to a problem before you for solution in private life. In both situations, your plain common sense, the education your experience and observations have brought you, are available with just the same degree of usefulness. Nothing results from your oath requiring you to reason differently or change your mature method of reasoning from the course you would pursue in your private affairs in determining a serious question. The effect of your official position as jurors is to face you with an obligation to calmly and seriously study the evidence, to ascertain the clear existence of fundamental facts asserted to have been shown in the evidence and to correlate them properly into a line of proof so that, as jurors, you are able to say that the ultimate facts of the guilt charged against a defendant is shown to a moral certainty, whereas, if it were a private matter, you might be satisfied with a solution which is supported by a mere preponderance of evidence."

to which instruction defendant appellant duly excepted for the reason that the said instruction does not correctly state the law as to the duty of jurors and is contradictory and misleading. (214, 215, 216)

ASSIGNMENT OF ERROR NO. LXXVI.

The Court erred in instructing the jury as follows:

> "The respective sections of the statute applicable to this case are acts of Congress. It is no concern of the United States how many frauds are committed in this state, or in any other state not connected with the United States mails, because the Constitution of the United States does not give Congress the right to interfere with such matters. It leaves the exercise of that power entirely with the state. But Congress has adopted the method which at least affects it in some measure, and this is by the medium of a law relating to the mails. Over the United States mails, the Government has, of course, full control, and has the right to see that they shall not be used as an intrument to further any scheme to defraud. It does not punish the fraud; it punishes a party for using the mails to defraud. In other words, the gist of the offense is the use of the mails. The policy of the United States is to prevent the misuse of the mails of the United States in the furtherance of dishonest schemes or swindles. The Government intends that the post office establishment shall be used by the people for the purpose of legitimate business and social intercourse, and that it shall not be used for the purpose of furthering dishonest schemes or practices."

to which instruction the defendant appellant duly excepted, for the reasons that the instruction does not correctly state the law and is confusing and misleading and leaves an inference that fraud had and does exist, regardless of the evidence, and over emphasizes the question of fraud. (217, 218)

ASSIGNMENT OF ERROR NO. LXXVII

The Court erred in instructing the jury as follows:

> "As I have already pointed out, the first five counts of the indictment charge as a part of the scheme to defraud, various false representations, pretenses and promises alleged to have been made by the defendants, or some of them, as a part of the scheme. The Government need not prove that the scheme was fraudulent in its inception, nor that any defendant who entered upon the execution of the enterprise did so with a present intention to participate in the alleged fraudulent scheme or practices."

to which instruction the defendant appellant duly excepted, for the reason that the said instruction does not correctly state the law or any charge of conspiracy. The intent to defraud is a necessary element, which must have existed at the time of the inception of the conspiracy in the mind of the accused. (218)

ASSIGNMENT OF ERROR NO. LXXVIII.

The Court erred in instructing the jury as follows:

> "You should understand gentlemen, and I think it is especially important in this case you should

understand that the terms of the act are such that fraud attempted in the execution of a plan or scheme whose aims are worthy is within its provisions. That is to say, that if one in charge of a legitimate business conceives a plan to promote it by fraudulent acts, and then, to help the fraudulent conception, he uses the mails, he becomes liable, no matter whether the object for which the fraudulent act is done is good or whether the intention is to benefit in the end the man deceived."

to which instruction the defendant appellant excepted for the reason that said instruction incorrectly states the law; is ambiguous and misleading and not complete and ignores the necessary element of an intent to defraud.

ASSIGNMENT OF ERROR NO. LXXIX.

The Court erred in instructing the jury as follows:

"One or more persons may form and accomplish an offense as charged in the first five counts of this indictment, with or without assistance, but all who, with criminal intent, or with knowledge of the criminal character of the enterprise, join themselves even slightly to the principal members, are subject to the statute, though they may know nothing but their own share in the aggregate wrongdoing. This applies to employees, if such employees have knowledge of the unlawful scheme or artifice to defraud.

"It is the duty of an employee to know the nature of the busines being transacted by his principal, and if it is brought to his knowledge and he ascertains that the law is being violated by his prin-

cipal, and he still continues in such employment, and by his work and labor, though such work and labor may be merely routine, he is regarded as a principal in whatever criminal acts may be commited, and punishable as such."

to which instruction the defendant appellant duly excepted for the reasons that the said instruction incorrectly states the law; is not complete and does not fully cover the question of employees and others and their necessary intent to participate in a fraudulent scheme, and is confusing and misleading. (219, 220)

ASSIGNMENT OF ERROR NO. LXXX.

The Court erred in instructing the jury as follows:

"The law permits a defendant in a criminal case at his own request to testify in his own behalf. The defendants herein have availed themselves of this right. Their testimony is before you and you may consider how far it is credible. The deep personal interest which they have in the result of this case may be considered by you in weighing their evidence and in determining how far, or to what extent, if at all, it is worthy of credit. In considering the credibility of, or weight which you should attach to the testimony of a defendant, you should regard, among other things, the inherent probability or improbability of their statements, and to what extent the same have been corroborated or contradicted by other evidence in the case, whether documentary or oral. Where a witness has a direct personal interest in the result of a case, especially in a criminal case,

> the temptation may be strong to color, pervert or withhold the facts."

to which instruction the defendant appellant duly excepted for the reason that the last sentence of said instruction, taken in connection with the said instruction, lays too much stress upon the the interest of a defendant and in effect instructs the jury to regard his testimony with suspicion and is highly prejudical. (220, 221)

ASSIGNMENT OF ERROR NO. LXXXI.

The Court erred in refusing to give to the jury defendant appellant's requested instruction No. 9 as follows:

> "The Court instructs the jury that where two or more wholly separate and distinct acts are charged against all of the defendants in one count of an indictment it is necessary, before you can arrive at a verdict of guilty as to any defendant, that you should believe beyond a reasonable doubt and to a moral certainty that any such defendant feloniously participated in both or all of such events or transactions charged in the indictment as constituting a single offense.
>
> *Beaux Arts Dresses v. United States,* 9 Fed. (2d) 531, 533."

to which refusal the defendant appellant duly excepted for the reasoin that the said instruction correctly states the law and is applicable to the evidence in this case, and the refusal to give this instruction, taken in connection with the instructions the Court did give, permitted the

jury to arrive at a verdict of guilty as to this defendant without believing beyond a reasonable doubt and to a moral certainty that he feloniously participated in the events or transactions charged in the indictment and particularly the sixth count thereof. (221, 222)

ASSIGNMENT OF ERROR NO. LXXXII.

The Court erred in refusing to give to the jury defendant appellant's requested instruction No. 10 as follows:

> "The Court instructs you that before you can convict in this case you must find that the defendants or some of them combined and confederated together, prior to the mailing of the letter set out in the indictment, or that after the fraudulent scheme, if any there was, formed by some of the defendants, other defendants, not parties to the original scheme, joined it with guilty knowledge of its false character and aided it by mailing or causing to be mailed the letter set out in the indictment in execution thereof. The existence of a scheme to defraud is a necessary prerequisite or condition to the commission of the offense.
>
> *United States v. Bachman,* 246 Fed. 1009."

to which refusal the defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in the case, (222, 223)

ASSIGNMENT OF ERROR NO. LXXXIII.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 11 as follows:

"You are instructed that, where a conviction for a criminal offense is sought upon circumstantial evidence, the prosecution must not only show by evidence beyond a reasonable doubt that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation, upon any reasonable hypothesis, other than that of the guilt of the accused, before a verdict of guilty can be found.

"In this class of cases the jury must be satisfied, beyond a reasonable doubt, that the offense charged had been commiteed (by some one of the defendants) in the manner and form as charged in the indictment, and then they must not only be satisfied that all the circumstances proved are consistent with the defendant having committed the act, but they must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that such defendant is the guilty person, before a verdict of guilty can be found. It is your first duty to determine from the evidence what facts and circumstances are thereby established, and then to draw from such facts and circumstances, after carefully examining and weighing them, your conclusions as to the guilt or innocence of such defendant. It is your duty to exercise great care and caution in drawing conclusions from proved facts. Such conclusions must be fair and natural and not forced and artificial. Unless all facts and circumstances taken together are of such

a conclusive nature as to establish beyond a reasonable doubt that the accused is guilty as charged, then he must be acquitted. It is not sufficient that conclusions create a probability of guilt, though a strong one, and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proofs fail. It is essential, therefore, that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. If then, all the facts and circumstances established by the evidence beyond a reasonable doubt can be reconciled with any reasonable hypothesis of any defendant's innocence, then it is your duty to acquit such defendant.

State v. Novak, 109 Ia. 717 (79 N. W. 465)"

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case and defendant appellant was entitled to have the same given to the jury. (223, 224, 225)

ASSIGNMENT OF ERROR NO. LXXXIV.

The Court erred in refusing to give the jury defedant appellant's requested instruction No. 12 as follows:

"I have stated to you that the offense may be established by circumstantial evidence; but circumstantial evidence, to warrant a conviction in a criminal case, must be of such character as to exclude

every reasonable hypothesis but that of guilt of the offense imputed to the defendant, or in other words, the facts proved must all be consistent with and point to his guilt only and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proven, and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

United States v. Richards, 149 Fed. 443, 454,

Terry v. United States, 7 Fed. (2d) 28."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (225, 226)

ASSIGNMENT OF ERROR NO. LXXXV.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 13 as follows:

"You are instructed that as to defendant Earl Canning you must consider the evidence given as it relates to him specifically and determine whether or not you are satisfied beyond a reasonable doubt that he, with intent to defraud, knowingly participated in any criminal act or aided or abetted in the commission of any criminal act charged in the indictment."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (226, 227)

ASSIGNMENT OF ERROR NO. LXXXVI.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 14 as follows:

> "The Court instructs the jury that where all of the circumstantial evidence is as consistent with innocence as with guilt, a verdict of guilty cannot be rendered."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (227)

ASSIGNMENT OF ERROR NO. LXXXVII.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 16 as follows:

> "I further instruct you that even though you may find from the evidence that the representations made in the letters and circulars received in evidence on the part of the United States were untrue, nevertheless, if the defendants, or any of them, believed and had reason to belive such representations to be true, no matter how inaccurate such belief may turn out to be, such belief would be a complete defense.

Horne v. United States, 182 Fed. 721,

Rudd v. United States, 173 Fed. 914,

Harrison v. United States, 200 Fed. 662."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (227, 228)

ASSIGNMENT OF ERROR NO. LXXXVIII

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 18 as follows:

> "The Court instructs the jury that it is not enough, in order to find a defendant guilty thereof, nor even that you believe that there is a strong probability of guilt. It is essential that you believe any such defendant guilty beyond all reasonable doubt, and such belief must be induced by facts and circumstances appearing on the trial which may be considered by you in view of your experience with the ordinary affairs of life."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have same given to the jury. (228)

ASSIGNMENT OF ERROR NO. LXXXIX

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 22 as follows:

"You are further instructed that the burden is upon the Government to prove beyond a reasonable doubt and to a moral certainty as to each defendant that he, or they, or some one under the direction of one or more of the defendants, deposited the mail matter charged as constituting an offense, in the United States Mails."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (229)

ASSIGNMENT OF ERROR NO. XC

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 26 as follows:

"You are instructed that evidence of good character of defendant Earl Canning has been received. This evidence is as proper for your consideration as that of any other fact in the case and the weight to be given such evidence is in your hands. Proof of good character in connection with all the other evidence in the case may generate a reasonable doubt, which entitles the defendant Earl Canning to an acquittal, even though without such proof of good character the jury would convict him.

Apodoca v. State, 21 Ariz. 273,

Bryant v. State, 116 Ala. 446, 23 So. 40,

Sunderland v. U. S. 18 Fed. (2d) 202, 214, 216,

Nanfito v. U. S. 20 Fed. (2d) 376,

Cohen v. U. S. 282 Fed. 871,

Suitkin v. U. S. 265 Fed. 489,

Edginton v. U. S. 164 U. S. 361, 17 S. Ct. 72, 41 L. Ed. 467."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have same given to jury. (229, 230)

ASSIGNMENT OF ERROR NO. XCI.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 27 as follows:

> "You are instructed that even if you should find beyond a reasonable doubt that financial statements made by defendant Earl Canning were erroneous, still you cannot convict him on any count unless you are satisfied that at the time he made them, he knew they were false and fraudulent and that he knowingly made them with intent to defraud, and unless you are so satisfied beyond a reasonable doubt you must return a verdict of not guilty for defendant Earl Canning on each and every count of the indictment."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in his case, and defendant appellant was entitled to have the same given to the jury. (230, 231)

ASIGNMENT OF ERROR NO. XCII.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 28 as follows:

> "You are instructed that the only evidence offered against defendant Earl Canning is that he at times kept the books and made certain financial statements for State Securities Corporation and Union Reserve Life Insurance Company. Unless you are satisfied beyond a reasonable doubt that he, with intent to defraud, knowingly made false and fraudulent financial statements, then you must, as to him, return a verdict of not guilty on each count of the indictment."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (231)

ASSIGNMENT OF ERROR NO. XCIII.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 29 as follows:

> "The Court instructs the jury that you cannot consider any evidence offered by the Government as binding upon the defendant Earl Canning if the Government has failed to connect said defendant with such evidence, or with events or transactions which any such evidence attempts to prove."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the

law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (232)

ASSIGNMENT OF ERROR NO. XCIV.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 30 as follows:

> "You are further charged that the burden is on the Government to prove, beyond a reasonable doubt, and to a moral certainty, the fraudulent character of the scheme set out in the indictment, and that it was so fraudulent from the beginning.
>
> *Colburn v. United States,* 223 Fed. 590,
>
> *Brooks v. United States,* 146 Fed. 223."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury.

ASSIGNMENT OF ERROR NO. XCV.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 31 as follows:

> "You are instructed that the defendants in a criminal case are not required to satisfy the jury of the existence of any fact, which, if true, is a complete defense. It is sufficient if such defendants create in the minds of the jury a reasonable doubt of the existence of such fact.
>
> *Hinshaw v. State,* 47 N. E. 157."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and defendant appellant was entitled to have the same given to the jury. (233)

ASSIGNMENT OF ERROR NO. XCVI.

The Court erred in refusing to give the jury defendant appellant's requested instruction No. 32 as follows:

> "The Court instructs the jury that it is the duty of each and every member of the jury in this case to decide the issues presented for himself, and if, after a careful consideration of all of the evidence of the case, and the instructions of the Court on the law and a free consultation with his fellows, there is any single juror who has a reasonable doubt of the defendant's guilt, it is his duty, under his oath, to stand by his conviction and favorable to a finding of not guilty. He should never yield his convicttions simply because some or even all of the other jurors may disagree with him.
>
> *Redman v. U. S.* 77 Fed. (2d) 126, 129 (CCA 9),
>
> *Ammons v. State*, 42 Sou. 165,
>
> 3 *Randall's Instructions to Juries,* Page 2301,
>
> *Berger v. U. S.* 62 Fed. (2d) 438, 77 Fed. (2d) 720."

to which refusal defendant appellant duly excepted for the reason that the said instruction correctly states the law and is applicable to the facts in this case, and de-

fendant appellant was entitled to have the same given to the jury. (233, 234)

ASSIGNMENT OF ERROR NO. XCVII.

The Court erred in modifying defendant appellant's requested instruction No. 21 which was submitted in the following form:

> "You are instructed that with respect to the declarations of one defendant made by him outside of the presence of any other defendant that before such declarations are competent as to any such absent defendant, it must be proved beyond a reasonable doubt, by independent evidence, that the scheme or artifice to defraud alleged in the indictment had been devised, and that such absent defendant was a party thereto. It must further be established beyond a reasonable doubt that such declaration was made by such defendant in furtherance of said scheme or artifice. It is only where knowledge and active participation, or an express or implied ratification of the alleged fraudulent scheme or device can be proved, that one defendant is bound by the statements or declarations of another. The fact that the declarations were made before a defendant may have become associated with an alleged scheme or conspiracy, if any there was, does not of itself render the declarations unadmissible against him.
>
> *Wallace v. United States,* 245 Pac. 300,
>
> *United States v. Babcock,* 3 Dillon 581,
> *Miller v. United States,* 133 Fed. 337, at 353,
>
> *Pope v. United States,* 289 Fed. 312."

by striking therefrom the last three sentences thereof and giving said instruction in the following form:

> "You are instructed that with respect to the declarations of one defendant made by him outside of the presence of any other defendant, that before such declarations are competent as to any such absent defendant, it must be proved beyond a reasonable doubt, by independent evidence, that the scheme or artifice to defraud alleged in the indictment had been devised and that such absent defendant was a party thereto."

to which modification this defendant appellant duly excepted for the reason that the instruction as requested correctly states the law and is applicable to the evidence in this case, and the defendant was entitled to have presented to the jury the law of the case as applicable to him and by its modification and refusal to give the part of the instruction the Court withdrew from the jury, it permitted the jury to find a verdict of guilty without finding that the defendant appellant had any knowledge or actively participated in or expressly or impliedly ratified any fraudulent scheme or device. (234, 235, 236)

SUBDIVISION NO. IX OF ARGUMENT

ASSIGNMENT OF ERROR NO. IV

The Court erred in denying the motion of defendant Canning to strike all the papers in Government's Exhibit No. 5, except the order showing the action of the Corporation Commission, for the reason that all other papers in said Government's Exhibit No. 5 were not properly identified, no proper foundation had been laid

for their introduction, and as to defendant Canning they are pure hearsay. (166)

ASSIGNMENT OF ERROR NO. VII.

The Court erred in denying defendant appellant's motion to strike the question put to the witness Willis Ethel relative to finding anything in the Corporation Commission's records relating to a permit issued to Raymond F. Marquis, Harry S. Marquis, George H. Cornes and Edgar G. Hamilton for the sale of stock, and the witness's answer to that question, for the reason that it is nowhere charged in the indictment that the failure to secure the permit was any part of the scheme to defraud, nor any part of the action taken to defraud; that the same was inadmissible and outside the issues of the case. (167, 168)

ASSIGNMENT OF ERROR NO. XVII.

The Court erred in denying the motion of defendant appellant Canning to strike from the evidence Government's Exhibits No. 10, 11, 12 and 19, for the reason that the constitutional rights of this defendant appellant to cross-examine witness King Wilson, who had testified he kept the books concerning entries made therein by him, had been denied by the Court in excusing the Govment witness King Wilson from further attendance upon said trial, and for the further reason that no materiality of the entries in said books had been shown. (179, 180)

ASSIGNMENT OF ERROR NO. XXVIII.

The Court erred in denying the motion of defendant appellant to strike Exhibit No. 22 from the evidence for

the reason that the said receipt books were not properly identified and were pure hearsay, and there was nothing before the Court to show that they were kept in the ordinary course of business, and there was no identification of any writing, the witness having testified that many of the books were not kept while she was in the employ of the State Securities Corporation, and she had nothing to do with them until 1937 and she had no knowledge of the making of those receipt books at the time, nor any knowledge of the ordinary course of keeping books. (186)

ASSIGNMENT OF ERROR NO. LXV.

The Court erred in denying the motion of defendant appellant made at the close of the Government's case, to strike from the evidence all of the parts of the Government's Exhibits No. 26 and No. 27 for identification, which had been marked and put in evidence, they being the purported minutes of State Securities Corporation and Union Reserve Life Insurance Company, respectively, for the reason that as to defendant Canning they are hearsay and no foundation was laid for their introduction; they were not properly identified; there was no showing that the minutes were kept in the regular course of business of the two companies, but on the contrary the evidence shows that they were written up at the end of the year. There was no showing that they had ever been communicated to defendant appellant Canning or that he had any knowledge thereof. (207)

ASSIGNMENT OF ERROR NO. LXVI.

The Court erred in denying the motion of defendant appellant Canning made at the close of the Government's

case, to strike severally and separately from the evidence Government's Exhibits numbered 4, 5, 6, 28, 39, 40, 41, 42, 43, 44, 45, 46, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62 and 63, for the reason that they, and each of them, separately and severally were irrelevant, incompetent and immaterial, too remote, not the best evidence, no foundation had been laid for their introduction and as to defendant appellant they, and each of them, are hearsay. (207, 208)

ASSIGNMENT OF ERROR NO. LXVII.

The Court erred in denying the motion of defendant appellant, made at the close of Government's case, to strike from the evidence Government's Exhibits numbered 8, 9, 10, 11, 12, 14, 15, 16, 17 and 18, severally and separately, they being the books and records of the companies, for the reasons that no proper foundation had been laid for their introduction; there was no showing that this defendant had any charge of the bookkeeping system, as to him they are hearsay, incompetent, irrelevant and immaterial. (208)

ASSIGNMENT OF ERROR NO. LXVIII.

The Court erred in denying the motion of defendant appellant, made at the close of the Government's case, to strike from the evidence all of the testimony of the witness Hair, for the reason that the witness testified that some of the figures which he presented to the Court he got from sources other than the books and records in evidence and upon which figures and testimony, so obtained, he could not be cross-examined, and such testimony constitutes hearsay because not based upon

facts, or books or records in evidence, and as to defend- and appellant his testimony is hearsay, incompetent, irrelevant and immaterial. (208, 209)

ASSIGNMENT OF ERROR NO. LXXIII.

The Court erred in denying the motion of defendant appellant, made at the close of all of the evidence, to strike all testimony given in the case of events claimed to have transpired subsequent to January 1, 1938, for the reason that, under Count Six, the conspiracy count in the indictment, the alleged conspiracy was alleged to have ended on January 1, 1938, and any events subsequent to such date would be wholly irrelevant, incompetent and immaterial and pure hearsay, and without the bounds of the indictment or the bill of particulars as it affects Count Six, the conspiracy charge. (213)